Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

PETITIONER,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Chris Barber was injured in a grade crossing accident and filed a negligence action against petitioner, Union Pacific Railroad Company. The jury awarded $5.1 million in compensatory damages and $25 million in punitive damages. The Arkansas Supreme Court affirmed. The court held that the punitive award was not excessive, citing evidence that UP had received complaints about the height of the weeds at the crossing and failed to cut them prior to the accident, had followed an industry-wide practice of emphasizing profits over safety, and failed to preserve records that might have been relevant. Petitioner believes that this is the highest punitive damages award ever upheld in a grade crossing case. The petition presents the following questions:

1. Whether the Arkansas Supreme Court erred when it held—in conflict with the standards established by this Court and other lower courts—that the punitive damages award conformed to due process.

2. Whether the Arkansas Supreme Court violated the Supremacy Clause when it held—in conflict with the rule followed by this Court and the Courts of Appeals for over a century—that it could affirm the general verdict of a jury permitted to consider a federally preempted theory of negligence so long as the jury might have based its verdict on an alternative theory.

RULE 29.6 STATEMENT

Petitioner Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Pet. App. 1a-42a) is reported at 2004 WL 352525 and 2004 Ark. LEXIS 128. The oral ruling of the trial court is unreported and appears at Pet. App. 43a-49a.

JURISDICTION

The Arkansas Supreme Court affirmed the judgment on February 26, 2004. A timely petition for rehearing was denied on April 8, 2004. Pet. App. 50a-51a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 52a-54a) reproduces the text of the Supremacy Clause, U.S. Const. art. VI, cl. 2, the Due Process Clause, U.S. Const. amend. XIV, § 1, and the provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, involved in this case.

STATEMENT OF THE CASE

This case involves a $25 million punitive damages award arising out of a railroad grade crossing accident. On January 19, 1998, a Union Pacific ("UP") train collided with a truck in St. Francis County, Arkansas. Pet. App. 1a-2a. The driver of the truck was killed, and the passenger, Chris Barber, was injured. *Id.* at 2a. Barber and his wife sued UP and the train engineer for negligence. The complaint "alleged that the accident was caused by Union Pacific's failure to control vegetation within its right-of-way ... , failure to properly sound audible warning devices, failure to keep a proper lookout, and operating the train at an excessive speed for the conditions." *Id.* The jury found in favor of the engineer, implicitly rejecting the "failure to properly sound audible warning devices" and "failure to keep a proper lookout" theories of negligence. But it returned a general verdict against UP, and awarded $5.1 million in compensatory damages and $25 million in punitive

damages. The Arkansas Supreme Court affirmed even though it assumed that one of the theories of negligence submitted to the jury may have been preempted by federal law.

To petitioner's knowledge this is by far the largest punitive damages award ever upheld by an American court in a railroad grade crossing case, even though there was no proof of intentional misconduct by UP. The Arkansas Supreme Court instead relied on evidence of corporate profits and fictional corporate safety "policies" that plaintiffs' attorneys can and will allege in every case against corporate defendants, eviscerating this Court's holding that substantial punitive awards must be reserved for genuinely reprehensible conduct. And the 5:1 ratio approved here, even in the face of a $5.1 million compensatory award, threatens to write out of the law entirely this Court's admonition that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). If that rule does not apply here, it is a dead letter.

Background And The Evidence At Trial

1. *Vegetation.* The Barbers' complaint asserted that UP failed "to control vegetation within its right-of-way." Pet. App. 2a. Evidence at trial demonstrated that vegetation had grown high enough to limit visibility to the east of the crossing. Abst. at 153-55.[1] Plaintiffs called an accident reconstruction expert who testified that a motorist 50 feet from the crossing could see 270 feet to the west, but only 63 feet to the east. *Id.* Although the train that hit Mr. Barber *actually came from the west* (Pet. App. 2a), plaintiffs

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[1] "Abst." citations refer to the abstracts of the record filed with the Arkansas Supreme Court. "Add." citations refer to the concurrently filed addendum.

theorized that a motorist could be so distracted when attempting to see past weeds to the east that he might miss an obvious train coming from the west. Abst. at 154-56, 159.

In support of this negligence claim, plaintiffs offered testimony that UP had received complaints about the vegetation at the crossing prior to the accident, and testimony from several persons who claimed to have witnessed "near miss" accidents at this crossing before. It was undisputed, however, that none of those witnesses could identify the trains in question as UP trains (another railroad operates on this track)—and none of them notified UP about the near misses. Pet. App. 15a-18a. There was also no evidence of prior accidents at this crossing. Further, the evidence showed that "Union Pacific entered into a contract with Tweedy Contractors to clear the vegetation four months prior to the accident," an action which two justices of the Arkansas Supreme Court characterized as "specifically taking affirmative steps to remedy any vegetation problems at Crossing 123, thereby demonstrating a lack of malice." *Id.* at 41a-42a (Dicky, C.J., and Thornton, J. dissenting).

2. *Train speed.* The plaintiffs also alleged that UP operated "the train at an excessive speed for the conditions." Pet. App. at 2a. When UP argued that federal law preempts the entire "subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings," under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 675 (1993), plaintiffs amended their complaint to allege that UP "failed to issue a 'slow order' calling for a speed restriction over that rail crossing." Pet. App. 4a. (A slow order is a voluntary reduction in the otherwise federally mandated "speed limit" for a particular length of track). UP argued that plaintiffs' "slow order" claim was merely an excessive speed claim in another form, and moved in limine to exclude all "evidence or argument that the train was traveling at an excessive speed." *Id.* at

4a-5a; Abst. at 18-28. The trial court granted the motion as to claims directly asserting excessive speed, but inexplicably "not as to whether they negligently failed to issue slow orders." Abst. at 41; *see also* Pet. App. 5a. UP objected to any testimony on the subject of slow orders. Abst. at 98. The trial court overruled UP's objection, *id.*, but granted UP a continuing objection to any such testimony. *Id.* at 100.

The federal track inspector with responsibility for this area testified that he had inspected the track, and that it was "Class 4" track safe for travel up to 60 miles per hour. Affidavit of Roy A. Cline, Add. at 356-57; *see also* 49 C.F.R. § 213.9(a). It was undisputed that the train in this case was traveling slower than that. Abst. at 18-19. Nonetheless the trial court allowed a former UP employee to testify that *he believed* the track was not maintained to the federal 60-mile-per-hour standard, and that "[i]f the track isn't maintained to 60 miles per hour, then you are supposed to issue a slow order." *Id.* at 92. That employee admitted that he does not know the difference between Class 4 and lower grades of track. *Id.* At the close of plaintiffs' case, UP moved for directed verdict on all speed-related claims, arguing that "negligent failure to issue a slow order is nothing more than an excessive speed claim using different words." *Id.* at 166. The court denied this motion. Pet. App. 5a.

3. *Nationwide corporate "policies".* In an effort to establish culpability, plaintiffs launched a broad attack on nationwide corporate "policies" of UP and the entire rail industry. First, they called an economist, Dr. Harvey Levine, who claimed to divine UP's corporate "policy" about railroad safety from an examination of UP's filings with the Surface Transportation Board and the Securities and Exchange Commission. Abst. at 124-26. Dr. Levine testified, on the basis of those filings and his prior experience in the railroad industry, that UP participates in an *industry-wide* national "policy" of "put[ting] company

profits before public safety." Pet. App. 30a; Abst. at 127-28. Dr. Levine testified that UP "knows it's going to pay claims every year," and can compute the "expected value" of those claims. Abst. at 132. He explained that "[w]hen you compare the result of that [expected value] calculation with what it would cost you to do the right thing, to fulfill your responsibility ... if it's cheaper not to do the right thing, then that information can go right into the budget process ...." *Id.* at 133. Dr. Levine clearly testified that UP should be condemned for its budgeting practices *nationwide*, far beyond the borders of Arkansas. *See id.* at 127.

4. *Document retention policies.* Plaintiffs also based their claims on alleged spoliation because UP, applying its standard document retention policies, failed to preserve certain records that plaintiffs later sought in discovery. First, UP did not preserve the dispatcher voice tape from the date of the accident.[2] No testimony ever disputed that the tape was recorded over in the routine course of business, seven months before plaintiffs filed their complaint. Second, UP also discarded track inspection records in accordance with its standard document retention policy. UP inspects its track, prepares written reports, and retains them for one year in accordance with FRA regulations. Abst. at 74; 49 C.F.R. § 213.241(b). After the complaint was filed, Patricia Long, a claims representative for UP, sought to obtain the track inspection reports that still existed by sending an email to Don Traylor, the manager of track maintenance. Mr. Traylor, however, did not have custody of the records, did not recall receiving Ms. Long's email, and failed to respond. When Ms. Long followed up with Mr. Traylor and learned that he never had the records, the actual custodian

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[2] UP routinely records conversations between dispatchers and train crews in order to document routing orders. Abst. at 174. These tapes are kept by UP for 90 days, even though the industry standard is to retain them for 30 days and the Federal Railroad Administration ("FRA") does not require that they be recorded or preserved at all. *Id.* at 172.

had already discarded them in accordance with UP's standard policy. Abst. at 66, 73-74. There was no evidence that the custodian had *any* knowledge of the lawsuit or the accident.

Based on this evidence, the trial court issued a spoliation instruction. He told the jury that "you may but are not required to infer that the content of the voice tape and the track inspection records would have been unfavorable to [UP]." Abst. at 188.[3]

The Jury Verdict And Post-Trial Proceedings

The jury returned a general verdict for the plaintiffs in the amount of $5.1 million. Pet. App. at 6a. It also responded in the affirmative to a punitive damages interrogatory which asked whether "Union Pacific acted with malice or in reckless disregard of the consequences." *Id.* The parties stipulated that UP's net worth was $9.6 billion, and "[t]hat figure was written on a board and displayed to the jury." *Id.* The jury returned with a $25 million punitive damages award, five times the amount of compensatory damages. *Id.* at 6a-7a.

UP moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or a remittitur of the

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[3] The spoliation instruction only referenced "voice tapes and track inspection records." Disregarding the record, however, the Arkansas Supreme Court nevertheless found that "there [was] evidence from which a jury would reasonably conclude that Union Pacific attempted to conceal 'slow orders' issued for this portion of track." Pet. App. 32a. The court referenced the testimony of Alan Blackwell, a former UP track inspector. *Id.* at 27a-28a. Blackwell testified that he found slow orders for various periods in 1996—covering the time prior and immediately subsequent to UP's acquisition of this track—but found no work records showing that the problems leading to the 1996 slow orders had been corrected. Abst. at 103-08. Numerous witnesses, including Blackwell, Abst. at 121, testified that they closely examined the track warrants in use at the time of this accident (which was in 1998), and *no* slow order was in effect for that track at that time. Abst. at 54-56, 149, 162, 172. Blackwell also conceded that a federal track inspector had inspected the track after 1996 and rated it safe for travel at 60 miles per hour. Abst. at 122.

punitive damages award, on the grounds that the award violated due process under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Pet. App. at 7a; Brief in Support of Defendant Union Pacific Railroad Company's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for New Trial, or in the Alternative, for Remittitur of Punitive Damages Award at 26-27 (May 24, 2002), Record at 3301-03. *State Farm* had not yet been decided. The trial court denied these motions. Pet. App. at 7a. In an oral ruling, the trial court explained its reasons for upholding the punitive award. First, the court clarified that it had not made any finding as to whether UP had spoliated evidence and emphasized that "I did not send this matter to the jury *on the issue of punitive damages* because of destruction of documents." *Id.* at 48a (emphasis added). Second, the court determined that the "proof presented on the issue of the vegetation" and the proof "concerning policies of the railroad company" was sufficient to support some award of punitives. *Id.* The court also acknowledged that the "slow order" testimony may have factored into the jury's decision on punitives. *Id.* at 47a-48a. Third, the trial court refused to reduce the amount of the award based upon evidence of UP's wealth and a deferential standard of review. The court stated that "I know $25 million is a whole lot of money," but "you also have to look at the net worth of the railroad," which represents "an awful lot of wealth." The court also stated that "I'm not supposed to substitute my finding in place of that of the jury." *Id.* at 48a-49a.

Proceedings On Appeal

UP raised two federal issues in the Arkansas Supreme Court. The court nevertheless affirmed the awards in their entirety.

1. UP argued that the jury's $25 million punitive damages award was unconstitutional under the *Gore/State Farm* guideposts, and further that Dr. Levine's testimony and the reliance on nationwide FRA statistics were exactly

the "practice which the Supreme Court condemned in [*State Farm*]." Abst. at 231-33. The court held that "Union Pacific properly preserved this point for appeal ... and that the award in this case is not excessive." Pet. App. 21a. In scrutinizing the magnitude of the punitive damages award under the Due Process Clause, the Arkansas Supreme Court explained that it was required to "determine whether the amount of punitive damages shocks the conscience of the court" under the three *Gore* guideposts. *Id.* at 31a.

First, the court held that UP's conduct was sufficiently "reprehensible" to justify a substantial punitive award based upon evidence of "several prior near-misses;"[4] evidence that "Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks;" and, in direct conflict with the trial court's ruling, evidence that UP "intentionally destroyed track records and voice tapes" and "attempted to conceal 'slow orders' issued for this portion of the track." *Id.* at 32a-33a. The court did not address UP's argument that Dr. Levine's "national policy" testimony improperly invited the jury to punish UP for conduct occurring outside of Arkansas (and indeed for the conduct of *other railroads* in the industry). Abst. at 232-33.

Second, the court held that a 5:1 ratio of compensatory to punitive damages was permissible, invoking this Court's statement in *State Farm* that "'[s]ingle-digit multipliers are more likely to comport with due process.'" Pet. App. 33a (alteration in original). It did not acknowledge *State Farm*'s

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[4] The citation to "near-miss" testimony is puzzling in this context because it was undisputed that none of the witnesses who claimed to have seen such events ever notified UP about them. Pet. App. 15a-18a. Indeed, UP moved in limine to exclude entirely such testimony as irrelevant, objected to its admission, and again argued on appeal that the near-miss testimony should have been excluded. The Arkansas Supreme Court acknowledged that "none of the parties could identify the near-miss trains as Union Pacific trains," but held that the near-miss testimony was properly admitted to demonstrate "a dangerous condition" even if it was not relevant to proving "notice of a danger or defect." *Id.* at 17a-18a.

other guidance that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. It instead held that "[t]he standard to be employed is whether the ratio is 'breathtaking.'" Pet. App. 33a.

Third, the court computed the "comparable civil penalties" by adding the maximum theoretically permissible fine under state law ($500 per day) and federal law ($22,000 per day) for failure to control vegetation at a railroad crossing, and then multiplying those fines by the number of days the problem allegedly existed. *Id.* at 33a-36a. This calculation yielded a total analogous penalty of $10 to $11 million, which the court deemed "comparable" to the jury's award of $25 million. *Id.* at 36a. The court made no effort to compare the award to prior punitive awards in other grade crossing cases which plainly revealed the excessiveness of the jury's verdict in this case.[5]

After its brief discussion of the *Gore* guideposts, the Arkansas Supreme Court stated that "[w]e will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award," and that "[u]nder these circumstances, where the award of punitive damages is appropriate and the net worth of the company is $9.6 billion, we cannot say that a $25 million punishment shocks the conscience."

2. UP also argued that a new trial was required because the trial court permitted the jury to find UP negligent for failure to issue a "slow order," a claim preempted by federal law. Abst. at 222-23. Plaintiffs argued that the theory was

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[5] UP cited *Brown v. Missouri Pacific Railroad*, 703 F.2d 1050 (8th Cir. 1983). In that case, for a similar grade crossing accident in Arkansas, the Eighth Circuit affirmed a punitive damages award of $62,000. To petitioner's knowledge, *Brown* is the largest punitive damages award for a grade crossing accident previously awarded in the state of Arkansas.

not preempted; they did not contest UP's argument that a new trial would be necessary if it was preempted. Brief of Appellee at 9-11 (July 16, 2003). The Arkansas Supreme Court refused to rule on the preemption question, holding *sua sponte* that it must affirm because UP did not challenge *every* theory of negligence presented to the jury. Pet. App. 19a-21a. "When the jury's verdict is rendered on a general verdict form, it is an indivisible entity ...." *Id.* at 19a. "[W]e will neither question nor theorize about the jury's findings." *Id.* "We cannot determine, and we will not speculate, upon which theory the general verdict of negligence was premised. ... Hence, we must affirm." *Id.* at 20a.

In its petition for rehearing, UP argued that a jury verdict that may have rested on a theory preempted by federal law must be set aside, *as a matter of federal law.* Petition for Rehearing at 6-10 (March 15, 2004). UP pointed out that this Court's precedents on the review of general verdicts, stretching back more than a century, uniformly require reversal whenever a legally defective theory is submitted to the jury, and any Arkansas procedural rule that would permit affirmance of a verdict that violates federal law is itself preempted. The Arkansas Supreme Court denied UP's petition without opinion.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to address two issues of great national importance.

1. This Court has recognized for more than a decade that increasingly enormous and arbitrary punitive damages awards threaten the foundations of our legal system, impose costs on the economy and consumers, and are inconsistent with the constitutional guarantee of due process. But this Court's efforts to restrain excessive punitive awards are still being disregarded.[6] Massive punitive awards in routine

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[6] Commentators have noted that *Gore* had virtually no effect on actual punitive awards. *See* Theodore Eisenberg & Martin T. Wells, *The*

tort cases remain common. This Court's intervention is still needed. Four attributes of this case make review especially appropriate to further "illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." *Gore*, 517 U.S. at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)).

First, this case involves unintentional conduct that falls, at most, at the low end of the reprehensibility spectrum. All of this Court's prior cases have involved intentional misconduct, leaving the lower courts with little guidance as to the constitutional limits on punitive awards in negligence cases. Although this Court observed in *State Farm* that where reprehensibility is low and compensatory damages are substantial, a 1:1 ratio "can reach the outermost limit of the due process guarantee," 538 U.S. at 425, courts have repeatedly declined to read this statement as a holding. On the facts presented here, *State Farm*'s critically important guidance can be transformed into a square holding that cannot be so easily disregarded.

Second, this case presents the opportunity to further clarify important limits on the nature of the evidence that can properly be used to support findings of aggravated reprehensibility. *State Farm* held that punitive awards may not be based on out-of-state conduct that was lawful where it occurred. This case should be used to clarify that state law punitive awards also may not be based on safety practices that conform to preemptive *federal* standards, on national corporate "policies" that value profits, or on alleged litigation misconduct that has nothing to do with the plaintiff's injury.

Predictability of Punitive Damages Awards in Published Opinions, The Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced, 7 Sup. Ct. Econ. Rev. 59, 61 (1999). *State Farm* has fared little better. *See infra* n.8.

Third, review is warranted here to clarify the application of the third *Gore* guidepost and to resolve a conflict with the Eleventh Circuit. The Arkansas Supreme Court held that this punitive award was consistent with due process, in part, because it was only 2.5 times the maximum possible cumulative fines that could be imposed under other state and federal law, never considering whether fines of that magnitude are ever imposed. In contrast, the Eleventh Circuit has held that fines *actually imposed* provide the appropriate comparison—not hypothetical maximums. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999). This Court should not permit reviewing courts to eviscerate this objective benchmark of fairness by disregarding the actual policies of the regulatory agency charged with responsibility for rail safety. Here, FRA imposed *no* fine for the conduct at issue and the jury's award was more than five times the total fines collected by FRA *for all U.S. non-hazardous materials violations for all railroads during the entire year following this accident. See infra* at 25.

Fourth, review is warranted here to resolve widespread confusion among the lower courts about the proper standard of review of punitive awards, and to resolve a conflict with the Ninth Circuit. This Court has explained that the excessiveness issue is a question of constitutional law. But the Arkansas Supreme Court, like many lower courts, instead treated it as a question of sufficiency of the evidence—stating that it "will not substitute [its] judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a. In contrast, the Ninth Circuit has held that, under this Court's decision in *Oberg*, "[t]he test of whether a punitive damages award survives review cannot be merely whether there is any evidence to support it." *In re Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir. 2001).

2. This Court should also grant review to resolve an important question of federal preemption. The trial court permitted plaintiffs to argue to the jury that UP was negligent because it failed voluntarily to reduce operating speeds over this stretch of track—which of course is simply another way of saying that the speed limit was too high. This Court has already held that federal law preempts all state negligence claims based on train speed. *Easterwood*, 507 U.S. at 675. Yet the Arkansas Supreme Court held that it need not order a new trial because the jury *might have* rested its verdict on another, non-preempted, theory of negligence. This Court has held, consistently and for more than a century, that a verdict must be reversed if any of the theories submitted to the jury were legally defective. Arkansas's contrary rule insulates jury verdicts that violate federal law from judicial review, and will seriously frustrate the federal interest in uniform rail safety regulation.

I. THIS COURT SHOULD GRANT REVIEW TO PROVIDE GUIDANCE ON THE STANDARDS FOR EVALUATING PUNITIVE AWARDS

A. A 1:1 Ratio Should Be The Presumptive Limit When Compensatory Damages Are Substantial

This Court explained in *State Farm* that a 4:1 ratio of punitive to compensatory damages is ordinarily "close to the line of constitutional impropriety," consistent with our legal system's long tradition of using "sanctions of double, treble, or quadruple damages to deter and punish." 538 U.S. at 425. Higher ratios might be justifiable "where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (quoting *Gore*, 517 U.S. at 582). But by the same token, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

This case affords an exceptional opportunity to clarify the application of *Gore*'s "ratio" guidepost, because the conduct at issue here—even viewed in its worst light—was barely more culpable than simple negligence. Punitive damages are commonly imposed in negligence cases when the jury, as here, finds that the defendant acted with "reckless disregard" of a known risk. Pet. App. 6a. But the lower courts have remarkably little guidance about the constitutional limits of punitive awards in negligence cases—beyond this Court's bare statement that "intentional malice, trickery, or deceit" is more reprehensible than "mere accident." *State Farm*, 538 U.S. at 419.

The Arkansas Supreme Court allied itself in this case with the growing body of lower courts that have essentially ignored this Court's guidance that ratios over 4:1 require extraordinary justification, and that 1:1 will frequently be "the outermost limit" when compensatory damages are substantial. Indeed, the court's opinion writes the 1:1 category out of the law entirely. The compensatory damages awarded in this case were unquestionably "substantial." *See id.* at 426 ($1 million is "substantial"). And UP's conduct, however characterized, was barely "reprehensible" enough to justify any constitutional award of punitive damages at all.[7] If a 1:1 ratio is not "the

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[7] The conduct at issue here would not warrant punitive damages at all under the law of many states. *See, e.g., Ill. Cent. R.R. Co. v. Hawkins*, 830 So. 2d 1162, 1172-73 (Miss. 2002) (vacating punitive damages in grade crossing accident with three fatalities, where plaintiff showed that uncut vegetation so obstructed visibility as to give motorists a four-second window in which to avoid collisions, and that "in an attempt to cut costs ICR was willing to risk the lives of motorists," because such showing did not demonstrate "willful, egregious behavior" as required by state law); *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 247-49 (Mo. 2001) (vacating punitive damages in grade crossing accident, where plaintiff introduced "near miss" testimony, and showed that uncut vegetation created an extreme visibility safety hazard, because such showing did not demonstrate indifference or disregard that was "tantamount to intentional wrongdoing").

outermost limit" in a negligence case with a simple recklessness finding and compensatory damages in the multiple millions of dollars, then it never is. Yet the Arkansas Supreme Court authorized a punitive award five times the compensatory damages, crossing even the 4:1 line that this Court has repeatedly described as "close to the line" of "constitutional impropriety" for *any* case. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991); *see also Gore*, 517 U.S. at 581; *State Farm*, 538 U.S. at 425.

Out of the 31 cases since *State Farm* (not counting this one) in which compensatory damages exceeded $200,000 and the jury awarded punitive damages resulting in a ratio over 1:1, only one reviewing court has understood *State Farm* to require a reduction to 1:1.[8] Ratios of 9:1 and higher remain

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[8] *Compare Hangarter v. Provident Life & Accident Ins. Co.*, No. 02-17423, 2004 WL 1418017 (9th Cir. June 25, 2004) ($5 million punitives vs. $2.6 million compensatories); *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004) ($10 million punitives vs. $2.1 million compensatories); *Greenberg v. Paul Revere Life Ins. Co.*, 91 Fed. Appx. 539 (9th Cir. 2004) (en banc) ($2.4 million punitives vs. $540,000 compensatories); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) ($50 million punitives vs. $15 million compensatories), *cert. denied*, 124 S. Ct. 1423 (2004); *Zhang Wei v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) ($2.6 million punitives vs. $360,000 compensatories, reasoning that "no Supreme Court or Ninth Circuit case disapprov[es] of a single-digit ratio"), *cert. denied*, 124 S. Ct. 1602 (2004); *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003) ($2 million punitives vs. $500,000 compensatories), *cert. denied*, 124 S. Ct. 1168 (2004); *In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) (reducing punitive award from $5 billion to $4.5 billion exclusively because Ninth Circuit remand order explicitly demanded a reduction, despite compensatories of $513 million); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004) ($16.7 million punitives vs. $526,336.14 compensatories, for a ratio of 32:1); *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 298 F. Supp. 2d 746 (N.D. Ill. 2004) ($27.7 million punitives vs. $8.3 million compensatories); *S. Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090, 1098-99 (D. Ariz. 2003) (because "Supreme Court's holding on ratios ... is not categorical," $60 million punitives are constitutionally permissible where compensatories are $390,072.58, for a ratio of 153:1);

McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (approving, *inter alia*, $1 million punitives vs. $500,000 compensatories on assumption that "a multiplier of 9 or less means that the punitive damages presumptively pass[] muster"); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark.) ($21 million punitives vs. $5 million compensatories), *cert. denied*, 124 S. Ct. 532 *and cert. denied*, 124 S. Ct. 535 (2003); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App.) ($9 million punitives vs. $1.5 million compensatories), *rev. granted sub nom. Henly v. Philip Morris USA, Inc.*, 88 P.3d 497 (Cal. 2004); *Maya B. v. Vogel*, No. B150299, 2004 WL 551325 (Cal. Ct. App. Mar. 22, 2004) ($1.6 million punitives vs. $790,000 compensatories); *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003) ($1.7 million punitives vs. $405,000 compensatories), *rev. granted*, 86 P.3d 881 (Cal. 2004); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736 (Cal. Ct. App. 2003) ($1 million punitives vs. $258,570 compensatories); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, No. G029532, 2003 WL 21224088 (Cal. Ct. App. May 28, 2003) ($1 million punitives vs. $293,000 compensatories); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003) ($23.7 million punitives vs. $4.6 million compensatories); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903 (Mass. App. Ct. 2003) ($1.4 million aggregate punitives vs. $424,000 aggregate compensatories); *Honzawa v. Honzawa*, 766 N.Y.S.2d 29 (N.Y. App. Div. 2003) (vacating reduction of punitives to $10 million, and setting punitives instead at $15 million, on compensatories of $11 million); *Gallegos v. Elite Model Mgmt. Corp.*, Index No. 120577/00, 2004 WL 51604 (N.Y. Sup. Ct. Jan. 6, 2004) ($2.6 million punitives vs. $1.1 million compensatories); *Williams v. Philip Morris Inc.*, Nos. 9705-03957; A106791, 2004 WL 1259675 (Or. Ct. App. June 9, 2004) ($79.5 million punitives vs. $821,485 compensatories, for a ratio of 100:1); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669 (Or. Ct. App. 2003) ($3.5 million punitives vs. $500,000 compensatories); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. Ct. 2004) (citing *State Farm*'s 1:1 guidance, yet nevertheless affirming $2.8 million in punitives vs. $278,825 in compensatories); *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. Ct. 2003) ($805,000 punitives vs. $300,000 compensatories); *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867 (S.C. Ct. App. 2004) ($2.1 million punitives vs. $850,000 compensatories); *Haggar Clothing Co. v. Hernandez*, No. 13-01-009-CV, 2003 WL 21982181 (Tex. App. Aug. 21, 2003) ($1.4 million punitives vs. $210,000 compensatories); *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064 (Utah 2003) ($5.5 million punitives vs. $1 million compensatories), *cert. denied*, 124 S. Ct. 1716 (2004); *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 UT 34, 2004 WL 869188 (Utah Apr. 23, 2004) (on remand from this Court, setting punitives at $9 million vs. compensatories of $1 million, despite explicit contrary

routine. Indeed, on remand in *State Farm* itself the Utah Supreme Court recently defied this Court's explicit warning that "[a]n application of the *Gore* guideposts to the facts of this case ... likely would justify a punitive damages award *at or near the amount of compensatory damages*," 538 U.S. at 428 (emphasis added), by instead approving a 9:1 ratio. *Campbell v. State Farm*, No. 981564, 2004 UT 34, 2004 WL 869188, at *2-3, *10 (Utah Apr. 23, 2004). And just two weeks ago the Ninth Circuit announced that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, No. 02-17423, 2004 WL 1418017, at *11 (9th Cir. June 25, 2004). This Court should grant review to clarify that a 1:1 ratio is presumptively the due Process limit in cases where, as here, compensatory damages are substantial (and no intentional misconduct was proven).

B. Further Guidance Is Needed On The Nature Of The Evidence That Can Support Findings Of Reprehensibility

In *State Farm*, this Court held that punitive awards may be imposed only for conduct that is within the state's regulatory jurisdiction and closely related to "the acts upon which liability was premised." 538 U.S. at 422. The Arkansas Supreme Court violated those principles in several commonly recurring ways that can be curbed only through guidance from this Court.

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instruction in remand order); *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis.) ($3.5 million punitives vs. $490,000 compensatories), *cert. denied*, 124 S. Ct. 925 (2003), *with TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) (reducing punitives to close to a 1:1 ratio, in reliance on *State Farm*). *But see also Sufix U.S.A., Inc. v. Cook*, 128 S.W.3d 838, 842 & n.7 (Ky. Ct. App. 2004) (affirming $3 million punitive award on compensatories of $2.8 million, citing *State Farm*'s 1:1 ratio discussion).

Nationwide And Industry-Wide Conduct. This Court held in *State Farm* that permitting a state to punish defendants for conduct that is in fact governed by the law of another state would "'throw[] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" 538 U.S. at 421 (quoting *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914)). The plaintiffs in *State Farm* argued that out-of-state misconduct "was not the primary basis for the punitive damages award." *Id.* at 422. This Court nonetheless held that it required reversal, at least in the absence of a cautionary instruction.

The Arkansas Supreme Court committed precisely the same type of error that this Court reversed in *State Farm*: it allowed this case to be "used as a platform to expose, and punish, the perceived deficiencies of [UP's] operations throughout the country." *Id.* at 420. In concluding that UP's conduct was sufficiently "reprehensible" to justify a substantial punitive award, the court relied heavily on Dr. Levine's speculation that UP has a nationwide "policy" of prioritizing profits over safety. Pet. App. 31a-33a. Dr. Levine based that testimony on a review of UP's nationwide public filings, and on positions UP took as part of a national organization of railroads. Abst. at 126-27.

Indeed, plaintiffs invited the jury to punish UP for the conduct of *other railroads*. Dr. Levine testified in large part about general railroad industry policies.[9] And plaintiffs told the jury that FRA statistics showed "that people were dying in Arkansas more often than any state in the United States at grade crossings, Number One." Abst. at 42. Those

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[9] *See* Abst. at 134 ("When the industry-wide positions were taken in regard to railroad responsibility for grade crossing safety, Union Pacific was one of those that supported those positions."); *id.* at 136 ("I criticize all of the railroads for not spending enough money on grade crossing safety.").

FRA statistics included all accidents at all crossings involving all trains operating in Arkansas—including trains owned and operated by BNSF, Kansas City Southern or various short-line railroads, across track not owned by Union Pacific. This case therefore stampeded right past this Court's admonition against punishing defendants "for being an unsavory ... business," 538 U.S. at 423, and actually punished UP for being associated with an allegedly unsavory industry. *See also id.* at 418 ("Our concerns are heightened when the decisionmaker is presented ... with evidence that has little bearing as to the amount of punitive damages that should be awarded.").

"Expert" testimony like Dr. Levine's is a common and increasingly significant end-run around this Court's limitations on excessive punitive awards. The formula is simple: an accident occurred; the defendant earned profits last year that could have been spent on additional accident avoidance measures; therefore the defendant cares more about profits than people. Q.E.D. Such reasoning makes a mockery of this Court's insistence that substantial punitive awards may only be imposed for genuinely reprehensible acts within the jurisdiction of the state. The formula will justify a substantial punitive award in essentially every case against a corporation in those essential industries—from transportation, to heavy manufacturing, to pharmaceuticals —in which a zero accident rate cannot be achieved at a realistic or justifiable cost. (There were, for example, 2909 grade crossing accidents nationwide in 2003. *See* U.S. Dep't of Transp., Rep. No. MH-2004-065, *Audit of the Highway-Rail Grade Crossing Safety Program* 2 (June 16, 2004)).

Preempted Conduct. The Arkansas Supreme Court also contravened *State Farm*'s principles by upholding a punitive award based in part on conduct that is exclusively governed by *federal* law. The Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.*, was enacted to ensure that all "laws, regulations, and orders" relating to railroad

safety "shall be nationally uniform to the extent practicable." 49 U.S.C. §§ 20103(a), 20106. FRA has promulgated comprehensive federal regulations that reflect its expert judgment about how scarce safety resources should be allocated. Those regulations preempt state law, including state tort law, on any subject they cover.

This Court made abundantly clear in *Easterwood* that "for projects in which federal funds participate in the installation of warning devices" at grade crossings, FRA regulations cover the subject matter and preempt any state law that "seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671; *see also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 354 (2000) ("[O]nce the FHWA has funded the crossing improvement and the warning devices are actually installed and operating," even where those devices consist of nothing more than a sign, state negligence law is preempted). Notwithstanding the FRSA and this Court's rulings, Dr. Levine was permitted to opine in this case that railroads "have some responsibility for every crossing, even the ones that are funded by the public." Abst. at 130. The thrust of his testimony was that the federal program for grade crossing safety is inadequate, and the railroads are not fulfilling their (presumably state law) responsibility to provide automated crossings, "gates, lights, flashing lights and gates," etc. *Id.* at 128. That judgment directly conflicts with federal policy. There are more than 150,000 railroad grade crossings nationwide and FRA has made the judgment that it does not make economic sense to install automatic gates and flashing lights at every one. FRA has explained that allowing grade crossing policy to be set by state juries would produce "misallocation of scarce resources," emphasizing improvements "not where research and data indicates they will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed." *Selection and Installation of*

Grade Crossing Warning Systems, Notice of Proposed Rulemaking, 60 Fed. Reg. 11,649, 11,651 (Mar. 2, 1995).

Plaintiffs were also allowed to present hours of evidence and argument to the effect that UP was negligent for not issuing a "slow order" reducing operating speeds on this track (Abst. at 86-93, 101-12), despite the testimony of the federal track inspector that he had inspected the track and had rated it for safe travel at 60 miles per hour (Add. at 356, 420-21). The trial court recognized that plaintiff's claim about slow orders likely infected the jury's punitive award. Abst. at 207. But any theory that UP was negligent for failing to issue a "slow order" is a claim of "excessive speed," and therefore squarely preempted by the FRSA and the judgment of the FRA inspector. *See Easterwood*, 507 U.S. at 675.[10] If local rail safety officials cannot second-guess the judgment of a federal track inspector by imposing speeds lower than the federal limit, then juries may not do so under the guise of state negligence law. *Id.*

The Arkansas Supreme Court erred in upholding a punitive award that was based in part on preempted claims. Just like the nationwide conduct that this Court held to be beyond Utah's purview in *State Farm*, Arkansas simply has no authority to impose punitive damages based on preempted allegations about the speed of trains or the adequacy of federally funded crossing signals.

Unrelated Litigation Misconduct. Litigation misconduct such as spoliation of evidence is a "dissimilar act[], independent from the acts upon which liability was premised" and therefore cannot serve as a basis for punitive damages. *State Farm*, 538 U.S. at 422. Nonetheless, the Arkansas Supreme Court relied heavily on its conclusion that UP spoliated evidence in affirming this award,

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[10] *See also St. Louis Southwestern Ry. Co. v. Pierce*, 68 F.3d 276, 278 (8th Cir. 1995) (holding, and collecting cases that hold, that claims of negligent failure to issue or follow a slow order are preempted).

transforming the absence of evidence into direct evidence of reprehensibility at the time of the accident. The court suggested that the discarded track records and voice tape might have "contained remarks about the near misses testified to at trial and the dangerous condition presented by the overgrown vegetation." Pet. App. 28a.

That is blind speculation, not the "[e]xacting appellate review" that this Court has deemed necessary to "ensure[] that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'"[11] The Arkansas Supreme Court recognizes that the content of spoliated evidence is unknowable. It has refused to create an independent tort of spoliation because it would require impermissible speculation. *See Goff v. Harold Ives Trucking Co.*, 27 S.W.3d 387, 390-91 (Ark. 2000). Many courts have reached the same conclusion.[12] The use of such speculation

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[11] *State Farm*, 538 U.S. at 418 (citations omitted). The dispatch tape was rerecorded, under UP's standard recycling policy, months before this suit was even filed. Any tapes that might have reflected "the near misses testified to at trial," would have been recorded over well before this accident occurred, when UP unquestionably had no duty to preserve the tapes. Moreover, since plaintiffs only requested the tape for a two-and-a-half hour period surrounding the accident, *see* Request for Production of Documents No. 4 (Oct. 19, 1998), the court's speculation about reference to near misses or vegetation is a wild guess. Track inspection records contain only a track inspector's notations about the condition of the track itself (Abst. at 65), not general observations about the vegetation at grade crossings. The trial court recognized that no reasonable jury could conclude that these materials contained evidence of reprehensible conduct; it expressly held that he "did not send this matter to the jury on the issue of punitive damages because of destruction of documents," but rather on the vegetation and other issues. Pet. App. 48a. And the allegation that slow orders were spoliated, *see id.* at 32a, is immaterial as a matter of law. As documented in Part I.B *supra*, all speed issues were preempted.

[12] For example, in *Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511, 518 (Cal. 1998), the Supreme Court of California rejected the tort of spoliation (overturning in the process California Court of Appeals cases that had pioneered the spoliation tort), reasoning, *inter alia*, that "it is impossible to know what the destroyed evidence would have

to supply otherwise absent "reprehensibility" under *State Farm* would create a massive and essentially unreviewable loophole, since some records will have been lost or destroyed in almost any litigation. If an otherwise unremarkable case can support massive punitive damages based on speculation about spoliated evidence alone, plaintiffs lawyers will have a strong incentive to find spoliation issues in every case.[13]

Nor did UP have even the merest scintilla of notice that its failure to preserve records might result in a $25 million punitive damages award. Courts rarely, if ever, permit a monetary penalty for spoliation of evidence. The overwhelming majority of spoliation cases begin and end with a jury instruction permitting an adverse inference as was given here. UP was punished twice for spoliation—once by the adverse inference instruction and again by

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shown... It would seem to be sheer guesswork ...."' (Citation omitted) (first ellipses in original). *See also Meyn v. Iowa*, 594 N.W.2d 31, 34 (Iowa 1999) (same); *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1135 (Miss. 2002) (approving *Goff* and reasoning that "uncertainty of the fact of harm" warrants rejecting the spoliation tort); *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998) (noting that even courts that do recognize the spoliation tort recognize "that damages are speculative").

[13] The Arkansas Supreme Court may have been led astray by language in *State Farm* suggesting that the company's conduct "merits no praise" in part because its "employees altered the company's records to make Campbell appear less culpable." 538 U.S. at 419. That conduct was actually part of the underlying bad faith tort, not later litigation misconduct; State Farm altered those documents as part of its scheme to induce Campbell to proceed to trial instead of settling. Because that conduct was not "independent of the acts upon which liability was premised," it was relevant to the reprehensibility calculus. But there was also true litigation misconduct in *State Farm*, and this Court's treatment of *that* issue indicates that such matters may not be used to justify a punitive award. As Justice Ginsberg's dissent makes abundantly clear, State Farm *intentionally* spoliated evidence. *See* 538 U.S. at 434 (Ginsberg, J. dissenting) ("State Farm made 'systematic' efforts to destroy internal company documents that might reveal its scheme ... efforts that directly affected the Campbells."). This Court's opinion pointedly ignored that issue, stressing that punitives could be imposed only for "the conduct that harmed the plaintiff." 538 U.S. at 422-23.

punitive damages. Petitioner has been unable to identify *any* case in which a state supreme court or federal court of appeals has sanctioned a monetary award for spoliation that even approaches the magnitude of the punitive damages in this case.[14] And the Eighth Circuit recently remanded a $164,410.25 attorneys' fee award granted as a sanction for almost identical spoliation allegations because some of that figure might have been based on destruction of records before the litigation was filed. *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 751 (8th Cir. 2004). Of course it is undisputed that the dispatch tape in this case was recorded over long before any litigation was filed.

C. The Arkansas Supreme Court's Interpretation Of The Third Guidepost Conflicts With The Standard Applied In The Eleventh Circuit

The Arkansas Supreme Court held that this award passes review under the third *Gore* guidepost because "the total civil penalties authorized by law are comparable to the punitive damages award set by the jury in this case." Pet. App. 36a. The court added together the maximum possible state fine ($500 per day) and federal fine ($22,000 per day) for overgrown vegetation, treated every day as a separate violation, and arrived at an estimate of $10-$11 million in civil penalties. Of course, the punitive award affirmed by the court was more than double that estimate. But more importantly, the court's analysis is untethered from the purpose of making such comparisons: to ascertain whether

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[14] Monetary penalties for spoliation rarely exceed $250,000. The largest monetary penalty Petitioner has been able to locate was a $3 million award of punitive damages, remitted by the Supreme Court of Ohio to $1 million. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (Ohio), *cert. denied*, 513 U.S. 1059 (1994). The spoliation at issue in *Moskovitz* was orders of magnitude more reprehensible than the destruction of records in this case: in a medical malpractice case, the doctor literally whited out notations on a patient's chart, and then claimed at trial to have seen no evidence of cancer until well after a critical period. *Id.* at 336-37.

the defendant had fair notice that it might be subjected to an award of this magnitude. To that end, the relevant comparison is to the penalties actually imposed for similar misconduct, not the theoretical maximum.

The Eleventh Circuit confronted this issue in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), and rejected plaintiffs' suggestion that the proper comparison was to the $100,000 per day maximum fine authorized by Georgia law for stream pollution. The court properly recognized that "it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute." *Id.* at 1337. "[I]f the defendant had emptied a bottle of soda pop into a Georgia stream, it cannot reasonably be said that he was on notice he could be fined [the statutory maximum] $100,000." *Id.* The court looked instead to the actual fine imposed by Georgia as the best "indication of the 'legislative judgment' as to the 'appropriate sanctions for the conduct at issue.'" *Id.* (quoting *Gore*, 517 U.S. at 583).

The punitive award affirmed in this case is wildly disproportionate to the fines actually imposed by FRA for vegetation and other track maintenance violations. The *total* fines collected by FRA from all railroads in America for all safety violations (excluding hazardous materials)[15] for the year following this accident were $4.2 million, less than one-fifth of the punitive damages award in this case for allegedly overgrown vegetation at a single crossing. *See* Federal Railroad Administration, Office of Chief Counsel, *Railroad Safety Civil Penalty Cases Closed During Fiscal Year 1999* (Jan. 31, 2000). The FRA's fines actually imposed

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[15] FRA routinely reports hazardous materials (HMT) fines separately from all other rail safety fines, because while other safety fines are imposed exclusively upon railroads, HMT fines can be imposed against shippers as well.

thus gave UP no warning that it was exposed to $25 million in potential penalties.

D. The Arkansas Supreme Court Applied An Unconstitutionally Deferential Standard of Review In Conflict With The Ninth Circuit

When evaluating whether the jury's punitive award was unconstitutionally excessive, the Arkansas Supreme Court applied the same highly deferential standard of review it would apply to a motion to set aside a jury verdict on liability and grant a new trial. After discussing the *Gore* guideposts, the court held that it "will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a.

Footnotes in several of this Court's recent opinions do suggest that "specific findings of fact" are entitled to some deference in the due process analysis.[16] The lower courts are deeply confused about how to implement that deference in practice.[17] But however underlying facts are treated, one

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[16] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 & n.14 (2001); *see also id.* at 431 n.4; *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

[17] This Court has suggested, for example, that "[t]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous." *Bajakajian*, 524 U.S. at 336 n.10. Implementing that guidance is straightforward in a bench trial. But if the trial court has itself deferred to findings of fact by the jury under traditional "sufficiency of the evidence" review, it is not clear that the *court* has made "findings" of any kind. It has merely concluded that the evidence was sufficient to permit a reasonable jury to reach a particular conclusion—which is actually a question of law, ordinarily reviewed *de novo*. *See, e.g., United States v. Overholt*, 307 F.3d 1231, 1249 (10th Cir. 2002). The lower courts are in disarray on this issue, with some appellate courts deferring to the jury and others to comments made by the trial court in the course of its own excessiveness review.

Another related problem is what qualifies as a "specific finding[] of fact" entitled to deference under *Cooper Industries*, 532 U.S. at 440 n.14. Presumably any facts explicitly found by the jury on a special verdict form qualify for deference, as do facts necessarily implied by the jury's

thing ought to be clear: "the level of punitive damages is not really a 'fact' 'tried' by the jury" at all, and is therefore not entitled to deference of any kind. *Cooper Indus.*, 532 U.S. at 437. The Arkansas Supreme Court clearly erred by holding that it would not "substitute [its] judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a.

The standard of review adopted by the Arkansas Supreme Court also conflicts with the settled law of the Ninth Circuit. In *In re Exxon Valdez*, 270 F.3d at 1238, the Ninth Circuit noted that "[o]rdinarily appellate courts must defer to juries," and that "[i]f a reasonable mind could reach the result the jury reached on the evidence before them, that is ordinarily the end of it." The jury's $5 billion award in *Exxon Valdez* would have survived that kind of review: "This was a very bad oil spill ... and the jury may well have decided that for such egregious conduct the company responsible ought to have a year without profit." *Id.* at 1238-39. The court recognized, however, that "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards." *Id.* at 1239. Therefore "[t]he test of whether a punitive damages award survives review cannot be merely whether there is any evidence to support it ...." *Id.* at 1240. The Ninth Circuit went on to apply the *Gore* guideposts, and held that the award was unconstitutionally excessive. This

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verdict on liability or its finding authorizing punitive damages. But in the punitive damages phase itself, the jury generally just returns a number. It is not possible to glean from that number which of the (often many) allegations of reprehensible conduct the jury actually accepted. Indeed, the jury might have concluded that the defendant's conduct was barely reprehensible at all, but that its wealth necessitated a substantial award. Nonetheless many courts (including the Arkansas Supreme Court here) claim to "defer" to the jury by simply adopting the most egregious view of the defendant's conduct, on every issue, that the evidence could possibly support. Others (particularly the Ninth Circuit, as discussed in the text) undertake a more realistic and independent review of the evidence.

award cannot withstand scrutiny under that standard of review.

II. THE ARKANSAS SUPREME COURT'S VIOLATION OF THE SUPREMACY CLAUSE ALSO WARRANTS REVIEW

The trial court clearly erred in holding that plaintiffs' "excessive-speed claim" was preempted but that "their claim of negligent failure to issue a 'slow order'" was not.[18] But the Arkansas Supreme Court refused to review that error on the ground that the jury *might have* imposed liability for one of the other theories of negligence plaintiffs relied upon.[19] "[B]ecause we conclude that there was sufficient evidence of negligence, we are unwilling to speculate upon which theory of negligence the jury premised its verdict." Pet. App. 21a. That state rule of appellate review is inconsistent with this Court's precedents, frustrates Congress's declared purpose of uniformity in rail safety regulation, and must be set aside.

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[18] Pet. App. 5a. In their response to UP's Petition for Rehearing, plaintiffs asserted that no slow order claim was submitted. *See* Appellees/Plaintiffs' Brief Opposing the Petition for Rehearing at 1-2 (Mar. 27, 2004). But the trial court recognized that "the jury had an opportunity to consider whether or not the railroad may have ignored some slow orders." Abst. at 207. The Arkansas Supreme Court recognized that plaintiffs' amended complaint alleged that Union Pacific "failed to issue a 'slow order,'" Pet. App. 4a, and that the trial court denied UP's in limine and directed verdict motions as to the "claim of negligent failure to issue a 'slow order.'" *Id.* at 5a. The jury heard voluminous evidence on this issue. Abst. at 86-93, 100-123.

[19] The Arkansas Supreme Court used "sufficiency of the evidence" language, but clearly understood that UP's argument was in fact federal preemption. *See* Pet. App. 2a-5a (noting that UP raised an affirmative defense of federal preemption against "the Barbers' claims on track maintenance and 'slow orders'); *id.* at 5a (noting that the trial court granted UP's "motion in limine as to the Barbers' excessive-speed claims on grounds of federal preemption, but denied the motion as to their claim of negligent failure to issue a 'slow order'").

This Court has held consistently for 120 years that a general jury verdict must be reversed if *any* theory submitted to the jury was predicated on an error of federal law. *See Maryland v. Baldwin*, 112 U.S. 490 (1884); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 497-98 (1980). And a state rule of decision cannot control when it operates to defeat a properly asserted federal right. As this Court explained in *Felder v. Casey*, 487 U.S. 131 (1988), a "'federal right cannot be defeated by the forms of local practice.'" *Id.* at 138 (quoting *Brown v. W. Ry. Co. of Ala.*, 338 U.S. 294, 296 (1949)). Felder sued police officers under 42 U.S.C. § 1983, but the Wisconsin Supreme Court dismissed his case for failure to comply with the state's notice-of-claim statute. *Id.* at 136-38. This Court held that Wisconsin's rule of practice frustrated the remedial purpose of Section 1983, and was therefore preempted. The Court stressed that "actions brought in state court w[ould] frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts." *Id.* at 141. This Court has reaffirmed many times that states cannot adopt outcome-determinative rules of practice that frustrate the assertion of federal rights.[20] Standards of appellate review are no exception.

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[20] *See Johnson v. Fankell*, 520 U.S. 911, 920 (1997) ("One of the *primary grounds* for our decision [in *Felder*] was '[the chance of] different outcomes' depending on whether § 1983 claims were brought in state or federal court ...."); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (state may not apply state rule of practice to find that railroad executive waived jurisdictional defenses conferred by federal law); *Brady v. S. Ry. Co.*, 320 U.S. 476, 479 (1943) (state may not apply state rule for reviewing sufficiency of the evidence in FELA case); *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 299 (1949) (federal law controls pleading standards, because otherwise "desirable uniformity in the adjudication of federally created

This Court held in *Chapman v. California*, 386 U.S. 18 (1967), for example, that the "harmless error" standard for review of criminal convictions involving potential constitutional violations is governed by federal law, even in state court. "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Id.* at 21.

Because the federal rule would require reversal when it is impossible to know whether the jury based its verdict on preempted grounds, this case presents exactly the circumstance that *Felder* and *Chapman* forbid. The Arkansas rule shelters from review jury verdicts that violate federal law, and guarantees that lawsuits involving preemption claims "will frequently and predictably produce different outcomes ... based solely on whether that litigation takes place in state or federal court." *Felder*, 487 U.S. at 141. That result has broad implications for the administration of justice, and will plainly frustrate the federal interest in uniform rail safety policy.[21]

CONCLUSION

For the reasons explained above, the petition for certiorari should be granted, and the decision of the Arkansas Supreme Court should be subjected to plenary review or summarily reversed.

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rights could not be achieved"); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 360 (1952) (federal practice controls which issues are for judge and which are for jury in FELA case); *Bowman v. Ill. Cent. R.R. Co.*, 142 N.E.2d 104, 115 (Ill.) (federal law governs standard of review of jury verdicts in FELA cases), *cert. denied*, 355 U.S. 837 (1957).

[21] If this Court has any doubt that the complex and significant issues of federal rail policy raised by this case warrant certiorari, Petitioner respectfully suggests that this Court request the views of the Solicitor General.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

No. 03-57

UNION PACIFIC RAILROAD COMPANY, APPELLANT	Opinion Delivered
VS.	APPEAL FROM THE ST. FRANCIS COUNTY CIRCUIT COURT NO. CIV-98-312
CHRIS BARBER and CLAUDETTE BARBER, ALLIED WASTE INDUSTRIES, INC., APPELLEES	HON. HARVEY L. YATES, JUDGE
	AFFIRMED.

FEBRUARY 26, 2004, OPINION DELIVERED.

JUDGES: ANNABELLE CLINTON IMBER, Associate Justice. DICKEY, C.J., and THORNTON, J., dissent.

OPINION

ANNABELLE CLINTON IMBER, Associate Justice.

This case arises from a collision between a train owned and operated by Appellant Union Pacific Railroad Company (Union Pacific) and a garbage truck occupied by Appellee Chris Barber. A jury returned a verdict that found Union Pacific negligent and awarded Mr. Barber and his wife $ 5.1 million in compensatory damages. In addition, the jury concluded that Union Pacific acted with malice or reckless disregard and awarded the Barbers $25 million in punitive damages. We affirm the judgment.

At about 9:15 a.m, on January 19, 1998, a garbage truck owned by Browning-Ferris, Inc., was struck in St. Francis County by one of Union Pacific's freight trains. The

garbage truck was traveling north over the railroad crossing as the train was traveling eastbound on the track. At the time of the accident, Charles Rolfe was driving the garbage truck while appellee Chris Barber sat in the passenger seat. The train struck the rear portion of the garbage truck on the driver's side, killing Mr. Rolfe and injuring Mr. Barber.

On October 19, 1998, Mr. Barber and his wife, Claudette Barber (hereinafter "the Barbers"), filed a complaint against Union Pacific Railroad Company, L.E. Piper, Jr., the train engineer at the time of the accident (hereinafter referred to collectively as "Union Pacific"), and Asplundh Brush Control Company. The complaint alleged that the accident was caused by Union Pacific's failure to control vegetation within its right-of-way in violation of Ark. Code Ann. § 23-12-201, failure to properly sound audible warning devices, failure to keep a proper lookout, and operating the train at an excessive speed for the conditions. In addition, the Barbers alleged that the crossing was abnormally dangerous. The Barbers later nonsuited the case against Asplundh pursuant to Arkansas Rule of Civil Procedure 41(a).

Meanwhile, Mr. Barber filed a workers' compensation claim against his employer, Allied Waste Industries, Inc.[1] In response to that claim, Mr. Barber was compensated in an amount exceeding $200,000.

Union Pacific answered the Barbers' complaint, denying the material allegations, and affirmatively asserting that the claim of excessive speed was preempted by federal law. Soon thereafter, the parties entered into settlement negotiations. After mediation, Union Pacific and the Barbers agreed to "settle around" Allied's workers'

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[1] At some point prior to Mr. Barber filing his workers' compensation claim Browning-Ferris, Inc., merged into Allied Waste Industries, Inc.

compensation lien.[2] The settlement called for Union Pacific to pay the Barbers $290,000 on or before February 18, 2000, and was contingent upon a court or the Workers' Compensation Commission approving the "settle around" provision.

A notice of intent to settle was forwarded to Allied, and on February 10, 2000, the parties filed a joint petition to approve settlement around the workers' compensation carrier. On February 28, 2000, Allied filed an objection to the parties settling around Allied's statutory lien pursuant to Ark. Code Ann. § 11-9-410 (Repl. 2002), and asserted that it was entitled to a lien on the proceeds of any settlement. In addition, Allied sought to intervene in the matter pursuant to Ark. R. Civ. P. 24 and Ark. Code Ann. § 11-9-410. A hearing by telephone conference on the settlement was set for February 28, 2000. Prior to the hearing, the Barbers sent a proposed order by facsimile to Union Pacific. According to the facsimile, counsel for the Barbers intended to submit the proposed order to the court after the telephone hearing. The record does not indicate whether the order was ever presented to the court; but, on March 3, 2000, the court filed a letter order that stated as follows:

> The court having considered Allied Waste Industries, Inc's objection to petition to approve settlement around workers' compensation carrier and all matters finds:
>
> That in accordance with Ark. Code Ann. § 11-9-410 and Arkansas case law that the Plaintiffs can settle around the W.C.C. carrier if the settlement is approved by the court. However, the W.C.C. carrier will have a lien on the proceeds of the settlement.

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[2] To "settle around," the settlement agreement expressly reserved Allied's right to pursue its subrogation claim against Union Pacific to recover workers' compensation benefits paid to Mr. Barber.

In response to that letter order, the Barbers notified Union Pacific via facsimile of their intent to appeal the court's order.

At that point, and without an appeal, the parties continued to litigate the matter in the circuit court. Allied filed a complaint in intervention, which was answered by Union Pacific and the Barbers. The Barbers continued with discovery, requesting a second set of admissions, which request elicited an objection by Union Pacific in a conjunctive-motion seeking a protective order. On June 23, 2000, the court set May 29, 2001, as the trial date.

On February 12, 2001, the Barbers filed an amended complaint. In their amended complaint, the Barbers alleged that Union Pacific failed to maintain the track at the crossing to the Federal Railroad Administration's Class 4 standards, failed to issue a "slow order" calling for a speed restriction over that rail crossing, and requested punitive damages. Union Pacific filed a joint answer and motion to dismiss, denying the material allegations, and affirmatively pleading that the Barbers' claims on track maintenance and "slow orders" were preempted by federal law.

In a letter dated March 13, 2001, counsel for the Barbers proposed to start deposing witnesses after acknowledging that "[s]ince March 12th has come and gone, it appears we will be trying this case." On March 27, 2001, Union Pacific filed a motion to approve the settlement agreement procured on February 2, 2000. The Barbers responded by filing an opposing motion to withdraw their previous joint petition to settle around the workers' compensation carrier. The circuit court set a new trial date for January 7, 2002, and, by order dated August 6, 2001, denied Union Pacific's motion to approve the settlement agreement. On December 13, 2001, the court concluded that the case was not ready for trial because the case "had turned into, not an issue of what happened to whoever (sic) the poor party out there was, it's

turned into a fuss between the lawyers on evidentiary issues." As a result, the trial was reset to begin on April 30, 2002.

Following several discovery disputes, the circuit court ruled on April 29, 2002, that the Barbers would be entitled to a jury instruction on spoliation of evidence. On April 30, 2002, the circuit court ruled on Union Pacific's various motions in limine, including a request that the court prohibit any evidence or argument that the train was traveling at an excessive speed. The court granted the motion in limine as to the Barbers' excessive-speed claim on grounds of federal preemption, but denied the motion as to their claim of negligent failure to issue a "slow order."

At the close of the Barbers' case-in-chief, and again at the close of all the evidence, Union Pacific moved for a directed verdict on the Barbers' claims that the crossing was abnormally dangerous, that Union Pacific negligently failed to issue or to disclose a "slow order," and on the request for punitive damages. The court denied Union Pacific's directed-verdict motions. The case was bifurcated with the jury first deciding the issues of liability for negligence, compensatory damages, and liability for punitive damages. The matter of negligence was submitted to the jury on a general verdict form.

While the jury was deliberating on the issues of negligence liability, punitive liability, and compensatory damages, counsel for Union Pacific observed Attorney B. Michael Easley, counsel for the Barbers, pressing his ear against the deliberation room. Although Union Pacific's counsel promptly confronted Attorney Easley, causing him to remove his ear from the jury-room door, neither counsel for Union Pacific nor counsel for the Barbers brought the incident to the court's attention at that time.

The jury returned a verdict in favor of L. E. Piper, the locomotive engineer, but found for the Barbers on their

complaint against Union Pacific and awarded compensatory damages in the amount of $5,000,000 to Mr. Barber and $100,000 to his wife. In response to a special interrogatory, the jury found that Union Pacific acted with malice or in reckless disregard of the consequences, thereby establishing liability for a punitive damages award. The amount of punitive damages was set to be determined by the jury in the second phase of the bifurcated trial.

Once the jury verdict was returned and read by the court, Union Pacific informed the court of Attorney Easley's conduct during jury deliberations and moved for a mistrial. The circuit court denied the request for a mistrial, but ruled that the only additional proof it would allow the Barbers to present during the second phase of the trial would be evidence of Union Pacific's net worth. Without presenting argument of any kind, the parties stipulated to the net worth of Union Pacific at $9.6 billion. That figure was written on a board and displayed to the jury at which time the jury retired to deliberate on the amount of the punitive damages award.

While the jury deliberated, the trial judge called the attorneys into his chamber for a discussion off the record. Following that discussion, the court went on the record under a conditional seal, whereupon Attorney Easley expressed remorse for his conduct in pressing his ear to the jury-room door during deliberations and submitted himself to sanctions. After considering the events and the manner in which the punitive damages portion of the case had been handled, the court concluded that Union Pacific suffered no prejudice in the matter. Defense counsel made no comments on the record. The court reiterated that there would be no basis for granting a mistrial if Union Pacific renewed its motion.

The jury ultimately reached a verdict and assessed punitive damages against Union Pacific in the amount of

$25,000,000. Union Pacific then filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial or a remittitur of the punitive damages award. The Barbers responded and also requested sanctions in connection with alleged discovery violations and spoliation of evidence. All motions were denied by the court, and the parties are now before this court on appeal.[3]

I. Mistrial

Union Pacific's first point on appeal stems from opposing counsel's improper actions in pressing his ear to the door of the jury-deliberation room. After counsel for Union Pacific witnessed Attorney Easley's misconduct, he withheld disclosure of the information until the jury returned an unfavorable verdict. At that point, Union Pacific brought the misconduct to the attention of the circuit court. The trial judge was stunned by counsel's actions but ruled that the jury verdict had not been compromised. Union Pacific argued that because the trial would have to proceed into a second phase on punitive damages, a mistrial was necessary. The circuit court refused to grant a mistrial; instead, it attempted to avoid any prejudice by limiting the presentation of evidence during the second phase of the trial to a stipulation regarding Union Pacific's net worth. Specifically, the circuit court instructed the jury that it would be considering the punitive damages award against Union Pacific. Counsel for the Barbers then explained to the jury that the parties stipulated that Union Pacific's net worth was $9.6 billion. That figure was written on a board, and the jury was informed the net worth figure equaled Union Pacific's total assets minus its total debts. Neither party made any other comments or arguments to the jury.

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[3] In addition to the briefs filed by Union Pacific as appellant, and the Barbers as appellees, *amicus curiae* briefs have been filed by the Arkansas Trial Lawyers Association, Railwatch, Inc., and The Kelly Waldron Memorial Foundation.

With only the circuit court's instructions, a figure of $9.6 billion, and an explanation of how that figure was calculated, the jury retired to deliberate. On appeal, Union Pacific argues that the trial court erred in denying its motion for a mistrial or, in the alternative, its motion for a new trial.[4]

It is well settled in Arkansas that a mistrial is a drastic and extreme remedy that should be granted only when there has been error so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected. *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000). The trial judge is given wide latitude to determine whether a mistrial is warranted. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000). The trial court has wide discretion in granting or denying a motion for mistrial, and that decision will not be disturbed on appeal absent an abuse of discretion or manifest prejudice to the movant. *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, ___ Ark. ___, 118 S.W.3d 525 (Sept. 25, 2003). In addition, to preserve a point for appeal, a proper objection must be asserted at the first opportunity. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998). Likewise, motions for mistrial must be made at the first opportunity. *Id.*

In *Arkansas Central R.R. Co. v. Morgan*, 129 Ark. 67, 195 S.W. 402 (1917), the jury had reached a stalemate in its deliberations, whereupon they were permitted to separate after the usual admonition of the court against talking to anyone about the case or permitting anyone to talk to them. One of the attorneys in the case escorted a juror to the

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[4] A motion for new trial is governed by Ark. R. Civ. P. 59 (2003). The rule specifically provides the grounds on which a new trial may be based. Ark. R. Civ. P. 59 (2003). Union Pacific fails to explain the basis, independent of its motion for a mistrial, for its motion for new trial. Accordingly, we treat this point on appeal as a claim of error with respect to the circuit court's ruling on the motion for mistrial with the relief requested being a new trial.

attorney's home, where the juror left his young unbroken horse, and the attorney loaned him an older, gentler horse. *Id.* Opposing counsel witnessed the events as they transpired, but made no complaint to the court until after the jury reached a verdict. *Id.* This court recognized that the attorney's conduct was improper but declined to reverse stating:

> The litigant should, in fairness, make his complaint to the court as soon as the information is obtained .... And if there is to be a mistrial in such cases, it should come when the prejudicial incident is discovered and the court has determined that the integrity of the trial has been destroyed. ... Having taken its chance on the verdict of the jury by failing to speak when it should have spoken, we will not disturb the finding of the court, upholding the integrity of the verdict.

Arkansas Central R.R. Co v. Morgan, 129 Ark. at 73-74, 195 S.W. at 405 (1917). This court's ruling over eighty years ago comports with our current rule that mandates a motion for mistrial be made at the first opportunity.

In this case, the actions of counsel for Union Pacific were similar to those of appellant's counsel in *Arkansas Central R.R. Co v. Morgan, supra.* That is, after witnessing the wrongdoing, counsel gambled on receiving a favorable jury verdict before informing the court of the misconduct. In oral arguments, Union Pacific conceded that it did not inform the trial court of the attorney misconduct at the first available opportunity. We explained that counsel is required to advise the court of an attorney's misconduct as soon as the information is discovered so that the court may inquire into the incident and remove any prejudice. *Arkansas Central R.R. Co v. Morgan, supra.* Had counsel immediately brought Attorney Easley before the court and explained the situation, the court could have separated Attorney Easley from co-counsel for the Barbers, thereby

insulating him from further participation in the case and removing any prejudice that may have resulted from his improper conduct.

Instead, as a result of Union Pacific's decision to take a chance on the result of the verdict, the trial court concluded that the second phase of the trial needed to be cut short in order to prevent any possible prejudice. In the trial judge's own words, "I really thought this thing needed to be pretty well shut down and no further arguments made." The law is well settled that motions for mistrial must be made at the first opportunity. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). The policy reason behind this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Id.* We note that other jurisdictions have come to a similar conclusion when counsel gambles on a favorable jury verdict before bringing the issue to the court's attention. *See Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1276-77 (5th Cir. 1989) (failure to request a mistrial on claim of attorney misconduct before the jury deliberations showed that the appellants "gambled" on the jury verdict, and weighed against granting a new trial); *Raymond v. Southern Pac. Co.*, 259 Or. 629 (1971) (holding that a party has no right to gamble on the outcome of the case and to avail himself of the irregularity or misconduct if a decision is adverse to him). The Oregon Supreme Court explained that the public's interest in the efficient use of judicial time and in the finality of the judicial process does not permit a party to gamble on a verdict before making a motion for mistrial. *Raymond v. Southern Pac. Co., supra.* We hold that by waiting for the jury to return a verdict and failing to bring the matter to the circuit court's attention at the first

opportunity, Union Pacific failed to preserve this argument for appeal.[5]

II. Prior Near Misses

In its second point on appeal, Union Pacific argues that the circuit court erred in admitting evidence of prior near misses at the track crossing where the accident occurred. Union Pacific makes a two-pronged attack on the use of the prior near-miss evidence. First, Union Pacific requests that we endorse a rule that prior near-miss evidence be excluded as a matter of law in railroad-grade-crossing cases. Second, Union Pacific contends that the circuit court erred in admitting the near-miss evidence because the Barbers failed to offer sufficient proof of substantial similarity in conditions. The Arkansas Trial Lawyers Association, through its *amicus curiae* brief, has urged us to decline Union Pacific's request that near-miss evidence be declared inadmissable as a matter of law.

A. Exclusion as a Matter of Law

Union Pacific recognizes that we have already enunciated a rule that near-miss evidence is admissible "upon a showing that the events arose out of the same or substantially similar circumstances." *See Carter v. Missouri Pacific R.R. Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984) (quoting *Fulwider v. Woods*, 249 Ark. 776, 461 S.W.2d 581 (1971)). Nonetheless, we are asked to overrule that case because near-miss evidence is inherently unreliable and unduly prejudicial, and, thus, should be excluded as a matter of law.

No case has been cited, and we can find none, that supports a *per se* exclusion of near-miss evidence. The admissibility of prior similar occurrences has been commonly accepted in Arkansas for many years. *See Ford*

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[5] In view of Attorney Easley's conduct during jury deliberations, a copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motor Co. v. Massey, 313 Ark. 345, 855 S.W.2d 897 (1993); *Westark Specialties, Inc. v. Stouffer Family, Ltd.*, 310 Ark. 225, 836 S.W.2d 354 (1992); *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986); *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984); *Houston General Ins. Co. v. Arkansas Louisiana Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980); *Arkansas Power & Light Co. v. Johnson*, 260 Ark. 237, 538 S.W.2d 541 (1976); *Fulwider v. Woods*, 249 Ark. 776, 461 S.W.2d 581 (1971). In addition, it is generally recognized that evidence of prior similar occurrences is admissible with a showing of sufficient similarity in circumstances. *See McCormick on Evidence*, 5th ed. 1999 p. 703-04 § 200. Thus, Union Pacific presses this court to pioneer a *per se* exclusion in the face of a sound majority position. While we are urged to adopt a *per se* rule in railroad-crossing cases, the supporting theory of unreliability is not so limited. Evidence of prior similar occurrences in railroad-crossing cases is not any less reliable than prior similar occurrences in any other context.

Furthermore, a necessary predicate to the adoption of a *per se* exclusion rule would be a decision by this court to break with our prior precedent in *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984). We have held that there is a strong presumption of the validity of prior decisions. *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000). Although we do have the power to overrule previous decisions, it is necessary as a matter of public policy to uphold prior decisions unless great injury or injustice would result. *Id.* The policy behind *stare decisis* is to lend predictability and stability to the law. *Id.* In matters of practice, adherence by a court to its own decisions is necessary and proper for the regularity and uniformity of practice, and that litigants may know with certainty the rules by which they must be governed in the conducting of their cases. *Id.* Precedent governs until it

gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable. *Id*

Union Pacific asserts that "a near miss leaves no record of the incident." We recognize that there are situations in which a near miss will occur leaving no tangible record of the incident. Yet, this does not mean that a near miss can never be verified or documented. For example, there will be occasions when the near miss is reported to the police, the railroad, or some other agency. Under the rule proposed by Union Pacific, near-miss evidence would be inadmissible regardless of its veracity. The admission of this evidence is considered on a case-by-case basis and the burden rests on the party offering the evidence to prove that the necessary similarity of conditions exists. *Westark Specialties, Inc. v. Stouffer Family, Ltd.*, 310 Ark. 225, 836 S.W.2d 354 (1992). Union Pacific has failed to demonstrate that allowing near-miss testimony into evidence gives rise to a result so patently wrong, so manifestly unjust, that a break in precedent is warranted. Accordingly, we decline to depart from our holding in *Carter v. Missouri Pacific R.R. Co.*, *supra*.

B. Substantial Similarity of Conditions

Prior to trial, Union Pacific moved in limine to prevent any evidence of near misses at the crossing where the accident occurred. The court ruled that it would allow evidence of near misses provided that they occurred within months of the accident. At trial, the Barbers introduced testimony by four witnesses about prior near misses. Union Pacific contends that the prior near-miss testimony elicited at trial did not arise out of circumstances substantially similar to the circumstances of the accident on January 19, 1998, when the garbage truck occupied by Mr. Barber was struck by one of Union Pacific's freight trains.

The general rule with respect to the admissibility of evidence of similar occurrences is that it is admissible only

upon a showing that the events arose out of the same or substantially similar circumstances. *Ford Motor Co. v. Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993). The burden rests on the party offering the evidence to prove that the necessary similarity of conditions exists. *Id.* The relevancy of such evidence is within the trial judge's discretion, subject to reversal only if an abuse of discretion is demonstrated. *Id.* In *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984), we upheld a trial court's ruling to exclude evidence of two prior near-misses. We concluded that the circumstances were not substantially similar because the flashing lights at the crossing had changed. *Id.* In determining the admissibility of prior similar occurrences, the critical question is whether the similarity of the circumstances makes it reasonable and probable that the same cause existed to produce the accident as did the near misses. *See, e.g., Chicago, R.I. & P.R. Co. v. Lynch*, 246 Ark 1282, 441 S.W.2d 793 (1969).

Whether an occurrence is substantially similar to the matter at hand depends on the underlying theory of the case. *Ford Motor Co. v. Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993). For example, evidence submitted to demonstrate a dangerous condition necessitates a high degree of similarity because it weighs directly on the ultimate issue to be decided by the jury. *Id.* However, the requirement of substantial similarity is relaxed when the evidence of other incidents is used to show notice or awareness of a potential defect in a product. *Id.* The theory of the Barbers' case was that the crossing was so overgrown with vegetation to the east that drivers attempting to cross could not see to the east without placing their vehicles in the zone of danger immediately adjacent to the track.

According to the Barbers, the circumstances that caused the accident in this case are simple. As the garbage truck approached the crossing headed north, the driver looked

eastward for a train. By the time the truck's occupants were able to get a clear view to the east, the garbage truck was already at the crossing as a train came into view from the west. The Barbers asserted that due to overgrown vegetation on the south side of the train tracks at County Road Crossing 123, a northbound traveler would be unable to check safely for trains before attempting to cross. They also claimed that the engineer's failure to sound the train's whistle and bell as it approached the crossing exacerbated the situation.

The near-miss evidence permitted by the circuit court may be summarized as follows. Susan Thweatt testified that she used the crossing every Sunday to get to church and occasionally to run an errand. Between November and December of 1997, Susan was traveling to church with her husband, Vernon Thweatt, and her two daughters. She was in the backseat with one of her daughters, and Vernon was driving the car southbound. As they approached Crossing 123, Vernon looked both ways and attempted to cross the tracks. At the same time, Susan looked to the east and saw a westbound train approaching. She yelled at her husband, he immediately braked, and then backed up until the train passed. Susan was unable to identify the train as either a Union Pacific or Burlington Northern train and never made a complaint to the railroad.

Vernon Thweatt testified about the same incident. He stated that the vegetation was overgrown at Crossing 123 and that he used it about four times per week. At the time of the incident, he was driving south towards the crossing with his wife and two children in the car. Vernon first checked to see that the east was clear and then turned to the west. As he was looking to the west, his wife screamed that a train was approaching from the east. He immediately applied his brakes at which point his bumper was within ten feet of the track. Vernon testified that the train did not

sound its whistle or bell at the crossing. Vernon was also unable to identify the train as either a Union Pacific or Burlington Northern train and never made a complaint to the railroad.

Troy Meredith testified that he traveled north over Crossing 123 several times on his way to sites where he searched for arrow heads. Mr. Meredith confirmed that the brush and shrubbery on the south side of the track blocked his view to the east as he traveled north. He had an incident in the fall of 1997 at Crossing 123 while traveling north over the tracks where he had to "goose [his] car and jump across the track in order to keep from getting hit." As he approached the crossing, he first looked to his west. When he looked to the east, the brush and shrubbery blocked his view. He continued to move forward looking to the east and by the time he could see the westbound train he was in a position where the train would have hit him if he did not continue across the tracks.

Lastly, Ray Thweatt testified that he had been using Crossing 123 for fifty to sixty years. Ray also confirmed that the vegetation to the east blocked his view of the track. Twice in 1997, while traveling north over the crossing, he got so close to the tracks that he was startled when he finally saw an eastbound train.

In this case, Mr. Barber's accident resulted as the Union Pacific train traveled east and the garbage truck traveled north over the crossing. Susan and Vernon Thweatt's near miss stemmed from a southbound approach to the crossing and a westbound train. Mr. Meredith's incident, on the other hand, occurred while he traveled north over the crossing and the train traveled west. In *First Security Bank v. Union Pac. R.R. Co.*, 152 F.3d 877 (8th Cir. 1998), the Eighth Circuit Court of Appeals concluded that the trial court did not err in excluding prior accidents where the drivers and the plaintiff were traveling in opposite

directions, and, thus, had entirely different perspectives of the crossing. Likewise, Susan and Vernon Thweatt's view of the crossing from the north side was entirely different from the garbage truck driver's view on the south side of the crossing. The vegetation on the north side of the track has little relevance in determining a view from the south side of the crossing. We conclude that the trial court abused its discretion in admitting Susan and Vernon's testimony.

Nonetheless, the danger complained of stemmed from overgrown vegetation on the south side of the track. The cause of the accident was impaired visibility to northbound travelers as a result of overgrown vegetation on the south side of the track. For both Mr. Meredith and Mr. Barber, the view to the east was obscured by the vegetation on the south side of the track as they approached the crossing heading north. One difference in the circumstances of the accident and Mr. Meredith's near miss is that the trains were traveling in different directions. The issue here, however, is whether the vegetation on the south side of the track was a danger to northbound travelers regardless of which direction the train was traveling. Mr. Meredith's testimony reveals that he and Mr. Barber were in a substantially similar circumstance—the drivers in both vehicles had to inch forward to look east down the track for a train. Likewise, Roy Thweatt's near miss was caused by overgrown vegetation on the south side of the track obscuring his view to the east. Due to the high degree of similarity, we cannot conclude that the circuit court abused its discretion in admitting the near-miss testimony of Troy Meredith and Roy Thweatt.

Union Pacific also contends that the trial court erred because none of the parties could identify the near-miss trains as Union Pacific trains. As such, Union Pacific argues that the evidence is irrelevant to show notice of a defect or condition. Evidence of similar occurrences is admissible

when the notice of a danger or defect is in issue. *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986). Evidence of similar occurrences is also admissible to demonstrate a dangerous condition. *Ford Motor Co. v. Massey, supra.* As already stated, the theory of the Barbers' case was that the crossing was so overgrown with vegetation on the south side of the track that drivers attempting to cross could not see to the east without placing their vehicles in the zone of danger immediately adjacent to the track. Under this theory, notice is not relevant; rather, the testimony of Troy Meredith and Roy Thweatt was properly admitted to demonstrate a dangerous condition.

In sum, while the circuit court abused its discretion in admitting Vernon and Susan Thweatt's near-miss testimony, we will not reverse a trial court's ruling on evidentiary matters absent a showing of prejudice. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430 47 S.W.3d 866 (2001). Evidentiary error may not be predicated upon a ruling which admits evidence unless it affects a substantial right of the party. Ark. R. Evid. 103(a) (2003); *Luedemann v. Wade*, 323 Ark. 161. 913 S.W.2d 773 (1996). We have repeatedly held that an evidentiary error is harmless if the same or similar evidence is otherwise introduced at the trial. *Luedemann v. Wade, supra*; *Williams v. Southwestern Bell*, 319 Ark. 626, 893 S.W.2d 770 (1995); *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990); *Thompson v. AAA Lumber Co.*, 245 Ark. 518, 432 S.W.2d 873 (1968). In light of the other near-miss evidence that was properly admitted at trial, we cannot say that Vernon and Susan Thweatt's testimony, which was merely cumulative, resulted in prejudice to Union Pacific. Accordingly, we affirm on this point.

III. Directed Verdict

For its third point on appeal, Union Pacific contends that the circuit court erred in denying its directed-verdict

motions on the theory that Union Pacific negligently failed to issue a slow order and on the theory that the crossing was abnormally dangerous. At trial, the Barbers premised their claim of negligence on several theories:

> (1) The violation of an Arkansas statute requiring a railroad to maintain its right-of-way free of vegetation;
>
> (2) The presence of an abnormally dangerous crossing;
>
> (3) The failure to sound the train's audible warning devices;
>
> (4) The failure to keep a proper lookout; and
>
> (5) The violation of federal regulations requiring a railroad to instruct its employees concerning its code of operating rules, time tables, and time table special instructions.

With the five theories before them, the jury was given a general verdict form on the claim of negligence.

When the jury's verdict is rendered on a general verdict form, it is an indivisible entity or, in other words, a finding upon the whole case. *South Cent. Arkansas Elec. Co-op. v. Buck*, ___ Ark. ___, 117 S.W.3d 591 (2003). This court will not speculate on what the jury found where a general jury verdict is used. *Id.* When special interrogatories concerning liability or damages are not requested, and this court is left in the position of not knowing the basis for the jury's verdict, we will neither question nor theorize about the jury's findings. *Hyden v. Highcouch, Inc.*, ___ Ark. ___, 110 S.W.3d 760 (2003).

In this case, Union Pacific does not challenge the sufficiency of the evidence to support the general verdict of negligence. Instead, it challenges the sufficiency of the evidence on two of several theories that support the general

verdict. We cannot determine, and we will not speculate, upon which theory the general verdict of negligence was premised. The evidence in this case reveals that the vegetation at Crossing 123 was severely overgrown. The overgrown vegetation on the south side of the train tracks blocked the view of anyone driving north over the crossing. In addition, drivers had to inch forward to a point where their vehicles were almost touching the track in order to get a clear view down the track. Moreover, by the time a person was able to adequately check the track for trains, he or she was in the zone of danger. The testimony supports a finding that these conditions caused the garbage truck to be hit by the Union Pacific freight train. Here, the jury could have based its verdict of negligence on the Barbers' theory that Union Pacific failed to properly maintain the vegetation at Crossing 123. Hence, we must affirm. *See, e.g., Union Pacific R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997); *see also South Beach Beverage Co. v. Harris Brands, Inc.*, 355 Ark. ___, ___ S.W.3d ___ (Dec. 11, 2003); *Hyden v. Highcouch, supra.*

When presented with this question at oral argument, Union Pacific cited our decision in *Missouri Pacific Railroad v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), for the proposition that a case must be reversed when a jury is presented with several theories and asked to render a general verdict. In that case, we found prejudicial error where the circuit court gave the jury an inapplicable instruction. Indeed, we have consistently held that we will presume prejudice from the giving of an erroneous instruction, unless rendered harmless by other factors. *See Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003); *Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (1996); *Davis v. Davis*, 313 Ark. 549, 856 S.W.2d 284 (1993); *MIC v. Barrett*, 313 Ark. 527, 855 S.W.2d 326 (1993). However, we have made a distinction between contesting the trial court's decision to give a jury instruction on one particular theory

of negligence, and challenging the sufficiency of the evidence to support a general verdict of negligence. *See Union Pacific R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). Here, Union Pacific challenges the sufficiency of the evidence to support two theories of negligence but does not challenge any of the jury instructions given by the trial court. Accordingly, we do not address the propriety of any instruction, and because we conclude that there was sufficient evidence of negligence, we are unwilling to speculate upon which theory of negligence the jury premised its verdict.[6]

IV. Punitive Damages

For its fourth point on appeal, Union Pacific attacks both the propriety of awarding punitive damages and the amount of punitive damages. As a threshold matter, the Barbers contend that Union Pacific waived any challenge to the sufficiency of the evidence on punitive damages because Union Pacific failed to move for a directed verdict at the close of all the evidence. We hold that Union Pacific properly preserved this point for appeal, that there is sufficient evidence to warrant an award of punitive damages, and that the award in this case is not excessive.

At the close of the plaintiff's case-in-chief, and again at the close of all the evidence in connection with liability, Union Pacific properly moved for a directed verdict on the issue of punitive damages. Union Pacific did not, however, move for a directed verdict at the close of the evidence in the second phase of the trial on punitive damages. This second phase occurred after the jury had determined that

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[6] We note that after submission of the appeal and oral argument, Union Pacific filed a motion to submit supplemental authorities. We denied the motion on February 5, 2004. Historically, we have been loath to entertain motions which directly affect a case after submission except in the most exceptional circumstances. We do not regard this situation to be so extraordinary as to warrant the special measures requested. *See In re Crossley*, 310 Ark. 435, 839 S.W.2d 1 (1992).

Union Pacific was negligent, that it acted with malice or reckless disregard of the consequences, and assessed compensatory damages. For support, the Barbers cite *Advocat v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), where we stated "the conclusion of all the evidence" occurs after the plaintiff's rebuttal evidence. Here, there was no rebuttal evidence and Union Pacific moved for a directed verdict at the close of all the evidence in connection with liability for punitive damages.

The purpose of a motion for directed verdict is to provide a procedure for determining whether the plaintiff has met the burden of establishing a *prima facie* case. *Wal-Mart Stores, Inc. v. Tucker*, ___ Ark. ___, 120 S.W.3d 61 (2003). A plaintiff need not establish a *prima facie* case in second phase of a bifurcated trial where only the amount of punitive damages remains to be decided. Thus, it is unnecessary for a defendant to move for a directed verdict as to liability after a jury has determined liability. Union Pacific has preserved its challenge to the sufficiency of the evidence to support an award of punitive damages by properly moving for a directed verdict on that issue at the close of all the evidence submitted in the liability phase of the trial.

A. Sufficient Evidence of Punitive Damages

We review the denial of a motion for directed verdict to determine if the jury verdict is supported by substantial evidence. *D'Arbonne Const. Co., Inc. v. Foster*, 354 Ark. ___, ___ S.W.3d___ (Oct. 9, 2003). Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, and it must force the mind to pass beyond mere suspicion or conjecture. *Id.* When determining the sufficiency of the evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was

entered, and we give that evidence the highest probative value. *Id.* A motion for directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *Id.* A motion for directed verdict should be denied when there is a conflict in the evidence, or when the evidence is such that fair-minded people might reach different conclusions. *Id.*

We have recently set out the standard for determining whether there is sufficient evidence to support an award of punitive damages in a negligence case:

> This court has said that an award of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992); *Missouri Pacific Railroad v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988); *National By-Products, Inc. v. Searcy House Moving Company, Inc.*, 292 Ark. 491, 731 S.W.2d 194 (1987). In other words, in order to support this element of damages by way of punishment, it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice may be inferred. *Mackey*, 297 Ark. at 145, 760 S.W.2d at 63; *National By-Products, Inc.*, 292 Ark. at 494, 731 S.W.2d at 196. In order to warrant a submission of the question of punitive damages, there must be an element of willfulness or such reckless conduct on the part of the defendant as is equivalent thereto. *Dalrymple v. Fields*, 276 Ark.

185, 188, 633 S.W.2d 362, 364 (1982) (quoting *Hodges v. Smith*, 175 Ark. 101, 293 S.W.2d 1023 (1927)).

D'Arbonne Const. Co., Inc. v. Foster, 354 Ark. at___, ___ S.W.3d at ___ (Oct. 9, 2003). The Eighth Circuit Court of Appeals has recognized that the critical inquiry is to determine whether there is evidence that a party likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury, and that he continued such conduct in reckless disregard of the consequences from which malice could be inferred. *See Aircraft Accident at Little Rock v. American Airlines, Inc.*, 351 F.3d 874 (8th Cir. 2003) (citing *D'Arbonne Const. Co., Inc. v. Foster*, 354 Ark. at___, ___ S.W.3d at ___ (Oct. 9, 2003)).

The evidence supporting an award of punitive damages, viewed in the light most favorable to the Barbers, is as follows. Willie Savage, a twenty-six year veteran of the railroad as a track-man, assistant foreman, and a foreman, testified for the Barbers at trial. Just before Southern Pacific Railroad's merger with Union Pacific in September 1996, he was working for Southern Pacific as a tie-gang foreman. According to Mr. Savage, a track inspector or road master would mark railroad ties that needed replacement and then a tie-gang would follow up replacing the bad ties. Savage explained that the tie-replacement was done to keep the track maintained as a sixty-mile-per-hour track. However, after Union Pacific took over the tracks, and prior to reaching the 123 Crossing, the railroad had stopped replacing all the bad ties and instituted a "cluster-buster" tie replacement program. In a cluster-buster, the tie-gang would only replace one or two ties in a string of bad ties. Mr. Savage explained that the railroad then issued a "slow order" for the portions of track where the cluster-buster replacement was being performed.

In connection with his work as a tie-gang foreman, Mr. Savage complained to his supervisor, Mac McCartney, about the 123 Crossing. Mr. McCartney went to the crossing, but stated that he was not in charge of fixing crossings. Mr. Savage was concerned that the overgrown vegetation at the crossing would prevent his men from seeing a train and that one of his vehicles crossing the tracks would get hit by a train. Mr. McCartney suggested that Mr. Savage place a flagger at the crossing before they attempted to cross it. According to Mr. Savage, one or two men would stand at the crossing and direct the vehicles to cross when it was safe. He also testified that in working for Union Pacific there was never any response to complaints about overgrown vegetation.

Carl Jones, another garbage truck driver, testified that he had experienced problems with the overgrown vegetation at Crossing 123. Mr. Jones attempted to contact Union Pacific in April 1997 to inform them about the problem. He made between seven and ten complaints by phone to Union Pacific regarding the 123 Crossing. In addition, Mr. Jones flagged down a Union Pacific worker on the road and complained that the vegetation at Crossing 123 was life threatening.

Donald DePriest, a retired locomotive engineer, locomotive fireman, and brakeman also testified for the plaintiffs. He worked for the railroad from 1962 through 2000. Mr. DePriest testified that while he worked as locomotive engineer for Union Pacific he informed the train master, Tommy Stokes, and the train safety committee that the 123 Crossing was a hazard to the railroad employees and the public because there was a danger of hitting a vehicle at the crossing.

Mayor Willetta Carroll of Palestine testified regarding her communications with Union Pacific. In 1997, Mayor Carroll contacted various personnel with Union Pacific

concerning the track going through Crossing 123, including Vice President Jack Kyle, David Peterson, and Arkansas Grade Crossing Safety Coordinator Larry Hatley. She told these persons that Crossing 123 was overgrown and unsafe.

In addition to considering the direct evidence that Union Pacific was put on notice that a life threatening condition existed at Crossing 123, the jury in this case was given an instruction on spoliation of evidence, which stated in part as follows: "In this case, the plaintiffs contend that by intentional conduct the defendant railroad failed to preserve voice tapes and track inspection records that should have been preserved. Therefore, you may, but are not required, to infer that the contents of the voice tapes and track inspection records would have been unfavorable to the defendant." In Arkansas, spoliation is defined as "the intentional destruction of evidence and when it is established, [the] fact finder may draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its action." *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 146, 27 S.W.3d 387, 388 (2000) (citing *Black's Law Dictionary* 1401 (6th ed. 1990)).

Alan J. Blackwell, a railway consultant, testified in the Barbers' case-in-chief. Prior to becoming a consultant, Mr. Blackwell worked for Union Pacific in many different roles, including track inspector, track supervisor, road master,[7] and assistant road master. After being hired by the Barbers's counsel in this case, Mr. Blackwell asked counsel to get the Union Pacific Inspector's records and the Federal Railroad Track Inspector's records. Counsel, however, was unable to get those documents from Union Pacific. He was also unable to review Union Pacific's dispatch tapes of communications between the dispatcher, the train crew, and the maintenance people. Union Pacific's director of dispatching practices and quality assurance, John Reininger,

[7] The road master is also called the manager of track maintenance.

testified as to the use of the dispatch voice tape. The voice tapes record conversations between a dispatcher and field employee. Mr. Reininger testified that Union Pacific retained the voice tapes for about ninety days, but that a claims representative could make a request to preserve the tape longer. According to Mr. Reininger, the tapes were recycled within ninety days even when people die. He also testified that the tapes would reflect reports from engineers of any dangerous condition experienced.

The discovery process in this case was the subject of testimony given by Patricia Long, a senior claims representative for Union Pacific. Ms. Long testified that she was involved as the claims representative and that she received the request for track records in October 1998 for the accident that occurred at Crossing 123 in January of that same year. She testified that the documents were retained for at least one year. Yet, according to Ms. Long, the track records in this case were no longer available when the request was made for them in October. She explained that her request for the track records was forwarded to Union Pacific's Manager of Track Maintenance in December, but no response was forthcoming. When Ms. Long followed up on the earlier request, she was advised that the track inspection records were unavailable.

Mr. Blackwell eventually made a trip to Union Pacific's headquarters in Omaha, Nebraska, and found a stack of "slow orders" concerning a different set of tracks in Louisiana that was subject to arbitration between Union Pacific and Burlington Northern Railroad. Mr. Blackwell discovered that "slow orders" for the 123 Crossing area were listed at the tail end of some of the Louisiana "slow orders." Blackwell explained that in 1996, before Union Pacific owned the tracks, various "slow orders" had been issued for the track covering the 123 Crossing. Those "slow orders" reduced the train's maximum speed from sixty miles

per hour to forty miles per hour. As noted earlier, Union Pacific merged with Southern Pacific on September 11, 1996. Although Mr. Blackwell had experience at Union Pacific maintaining computerized records of "slow orders," when he tried to find "slow orders" covering the 123 Crossing, Union Pacific told him the records did not exist. He was also unable to get Union Pacific's track inspection records. Finally, Mr. Blackwell discovered that Union Pacific had entered into a contract to have the overgrown vegetation at Crossing 123 cut back in August 1997, but it did not allot money for the contract.

Union Pacific cites this court to *Missouri Pacific Railroad v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), as authority for its assertion that there is insufficient evidence to support an award of punitive damages. In *Mackey*, we held that while there was no question of the railroad's negligence in maintaining its right-of-way, the evidence did not support an award of punitive damages. The *Mackey* court pointed out that there was no evidence that the crossing was hazardous or that the dangers had been presented to the railroad.

Based on the evidence detailed above, we conclude that there was ample evidence that Crossing 123 was hazardous and that Union Pacific was on notice of its condition. Here, direct evidence reflects that Union Pacific was notified of an imminent danger at Crossing 123. In addition, through the spoliation instruction, the jury was at liberty to infer that the destroyed voice tapes and track records contained remarks about the near misses testified to at trial and the dangerous condition presented by the overgrown vegetation. We conclude that the evidence in this case was sufficient to allow the jury to conclude that Union Pacific likely knew or ought to have known, in light of the surrounding circumstances, that allowing the vegetation to remain overgrown and allowing trains to pass through

Crossing 123 at close to sixty miles per hour would naturally or probably result in injury, and that Union Pacific continued such conduct in reckless disregard of the consequences from which malice could be inferred.

B. Excessive Punitive Damages Award

In addition to arguing that there was insufficient evidence to support an award of punitive damages, Union Pacific argues the award given by the jury is excessive under either state or federal standards. We have recently explained the standard for reviewing a claim of excessive punitive damages:

> We consider the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. Punitive damages are a penalty for conduct that is malicious or perpetrated with the deliberate intent to injure another. When punitive damages are alleged to be excessive, we review the proof and all reasonable inferences in the light most favorable to the appellees, and we determine whether the verdict is so great as to shock the conscience of this court or to demonstrate passion or prejudice on the part of the trier of fact. It is important that the punitive damages be sufficient to deter others from comparable conduct in the future. The conscious indifference of the alleged wrongdoer to the wrong committed is a pertinent factor in assessing punitive damages.

Advocat Inc. v. Sauer, 353 Ark. 29, 50-51, 111 S.W.3d 346, 358 (2003) (citations omitted).

We start by examining the enormity of the wrong in this case. There is evidence that Union Pacific was on notice of the dangerous and life threatening nature of this crossing through the complaints of its own personnel and the

complaints of the public. There is also evidence that several near-misses occurred at this crossing. Furthermore, the record reflects that Union Pacific destroyed important evidence directly related to this accident, including voice tapes and track inspection records. Viewing the proof and all the evidence in the light most favorable to the Barbers, we conclude that Union Pacific knew, or should have known of the extreme danger presented to the public at Crossing 123. In recognizing that danger, Union Pacific still consciously refused to remedy the situation. As such, Union Pacific's conduct reflects that it intentionally put the traveling public in harm's way. Under these circumstances, the enormity of the wrong is substantial.

There was also evidence to indicate a malicious intent perpetuated by Union Pacific. As noted by the Barbers in their brief, the record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety. In addition to evincing that corporate policy through the handbooks given to claims representatives, the Barbers presented expert testimony from Dr. Harvey Levine who performed an economic study and opined that Union Pacific's practices reflected that policy.

Lastly, we consider the financial and social condition and standing of Union Pacific. During the second phase of the bifurcated trial where the jury was called upon to determine the amount of punitive damages, Union Pacific stipulated that its net worth was $9.6 billion. Thus, there is no doubt that Union Pacific is in a strong financial and social condition. We note that the punitive damages award of $25 million amounts to 0.260% of Union Pacific's net worth.

Taken together under all the circumstances, including the evidence that Union Pacific intentionally destroyed unfavorable evidence, we conclude that an award of punitive damages was appropriate in this case. Thus, we turn next to

determine whether the amount of punitive damages shocks the conscience of the court. The United States Supreme Court has enunciated a three-factor test to determine whether an award of punitive damages is excessive. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). A *Gore* analysis is to be undertaken by the appellate court de novo. *Advocat v. Sauer, supra.*

Under *Gore*, to determine whether Union Pacific received adequate notice of both the conduct that would subject it to punishment and the magnitude of the sanction, we consider the following three factors:

> (1) the degree of reprehensibility of the defendant's conduct;
>
> (2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damages award; and
>
> (3) the difference between this remedy and the civil penalties authorized by statute or imposed in comparable cases.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). The three Gore criteria are to be given equal weight. *Advocat v. Sauer, supra.* We have employed the Gore test in three cases. *See Advocat Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003); *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Routh Wrecker Service v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998).

(i) Degree of Reprehensibility

Between *Gore* and its latest decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the United States Supreme court has enunciated several factors to consider in examining the reprehensibility of the tortfeasor. The Court held in *Gore* that (1) where the harm inflicted by the tortfeasor was "purely economic in nature[,]" (2) there was no evidence that the tortfeasor had acted in bad faith,

(3) there was no evidence that the tortfeasor had "persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions [,]" and (4) the record failed to disclose any "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," the tortfeasor's conduct was not sufficiently reprehensible to warrant the imposition of a $2 million award. In *State Farm Mut. Ins. Co. v. Campbell*, *supra*, the Court elaborated on factors for consideration when assessing reprehensibility: "whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

In the case at bar, the injury inflicted by Union Pacific was physical and not merely economic. Mr. Barber, as the passenger in the garbage truck, was severely injured while the driver, Mr. Rolfe, was killed. As already explained, there was evidence that Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks. In addition, the record reflects that Union Pacific engaged in acts of affirmative misconduct after being notified of the accident and the lawsuit against it. The evidence shows that Union Pacific intentionally destroyed track records and voice tapes. Furthermore, there is evidence from which a jury would reasonably conclude that Union Pacific attempted to conceal "slow orders" issued for this portion of track. The record also supports a finding that Union Pacific manifested a reckless disregard for the health and safety of others. Specifically, Union Pacific ignored the dangerous condition of a crossing in the face of constant complaints and near misses. While this was the first time that an accident had occurred at this crossing, there was

evidence of several prior near-misses. Under these circumstances, we conclude that Union Pacific's conduct was indicative of a high degree of reprehensibility.

(ii) Ratio

The *Gore* analysis also requires the court to consider the ratio of compensatory damages to punitive damages. Here, the compensatory damages were set by the jury at $5,100,000 and the punitive damages were set at $25,000,000. The multiplier in this case is roughly 5. Most recently, the Supreme Court has held that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, ... or, ... of 145 to 1." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at ___. The standard to be employed is whether the ratio is "breathtaking." *See Advocat, supra.* Under the circumstances of this case, a multiplier of 5 is justified.

(iii) Civil Sanctions

The final factor adopted by the United States Supreme Court in *Gore* for adequate notice is that of comparing the punitive damages award to the civil or criminal penalties that could be imposed for similar misconduct. *See Advocat v. Sauer, supra.* The Barbers point this court to 49 C.F.R § 213.5 (2003) and states that Union Pacific could have been fined up to $22,000 per day for each day of noncompliance. Union Pacific, on the other hand, directs this court to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), for the proposition that a fine cannot be multiplied on the theory that each day was a separate violation because the accident only happened once. Although the Supreme Court indicated in *Cooper v. Leatherman* that it would view passing out promotional material as a single incident under the Oregon Unlawful Trade Practices Act, it made no ruling on the issue because

the lower court did not apply the proper standard of review. *Id.*

A specific federal regulation governs vegetation on railroad property. 49 C.F.R. § 213.37 (2003) provides:

> Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not—
>
> (a) Become a fire hazard to track-carrying structures;
>
> (b) Obstruct visibility of railroad signs and signs and signals:
>
> (1) Along the right-of-way, and
>
> (2) At highway-rail crossings; (This paragraph (b)(2) is applicable September 21, 1999.)
>
> (c) Interfere with railroad employees performing normal trackside duties;
>
> (d) Prevent proper functioning of signal and communication lines; or
>
> (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

As noted earlier, Willie Savage testified that the vegetation at Crossing 123 caused his crew problems while they performed a cluster-buster repair on the railroad ties. Thus, there is evidence that the vegetation at Crossing 123 interfered with railroad employees performing normal trackside duties. The penalty provision of the federal code at issue states in pertinent part:

> a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not

> more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed.

49 CFR § 213.15 (2003). The regulatory provision at issue specifically contemplates recurring violations and increases the maximum penalty in those situations where a violation persists. In fact, the penalties provision of the code specifically states, "each day a violation continues shall constitute a separate offense." 49 C.F.R. § 213.15(a). Here, the evidence clearly reflects that the vegetation at Crossing 123 was potentially out of compliance from the time Union Pacific took over the tracks in September 11, 1996. Under the federal code, Union Pacific could be fined for each day of non-compliance after September 11, 1996. As such, the maximum civil penalty in this case may be calculated by multiplying $22,000 by each day of noncompliance. There were over 450 days between September 11, 1996, and the date of the accident at Crossing 123 on January 19, 1998. Accordingly, Union Pacific's noncompliance made them potentially liable for about $9.9 million.

In addition, Union Pacific could have been potentially liable under Arkansas law. The pertinent statutory provision provides:

> (a)(1) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways.

* * * *

> (b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each violation.

Ark Code Ann. § 23-12-201(a)(1), (b) (Repl. 2002). The plain language of the statute contemplates that a railroad will continue in noncompliance and will be assessed proportionally to the amount of time it fails or refuses to comply. At $500 per day, the railroad's liability could approach up to $182,500 per year. We conclude that the total civil penalties authorized by law are comparable to the punitive damages award set by the jury in this case.

In *Advocat v. Sauer*, *supra*, we enforced a $21 million punitive damages award, based upon a wrongful-death claim stemming from the neglect of a nursing and rehabilitation center's neglect of an elderly patient. Here, the punitive damages award of $25 million stems from a negligence action that resulted in one person's death and caused severe and permanent injuries to another person. We will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). In addition, the penalty needs to be sufficient to deter others of such conduct. *Id.* We have also recognized that punitive damages may validly amount to a windfall for the plaintiff. *Missouri Pacific R.R. Co., v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983). Under these circumstances, where the award of punitive damages is appropriate and the net worth of the company is $9.6 billion, we cannot say that a $25 million punishment shocks the conscience.

V. The Settlement

In its last point on appeal, Union Pacific contends that the circuit court erred in refusing to approve and enforce the settlement agreement around the workers' compensation lien of Allied Waste. This point is without merit.

After going through mediation, Union Pacific and the Barbers entered into a settlement agreement. The settlement specifically stated that it was contingent upon approval and payment by February 18, 2000. A hearing by telephone conference on the settlement was set for February 28, 2000, and the Barbers sent a proposed order by facsimile to Union Pacific with a notation that counsel intended to submit the proposed order to the court after the telephone hearing. The record does not reflect whether the proposed order was ever submitted to the court. It is clear, however, that the court did not sign the proposed order. Instead, the court filed a letter order on March 3, 2000, which stated as follows:

> The court having considered Allied Waste Industries, Inc's objection to petition to approve settlement around workers' compensation carrier and all matters finds:
>
> That in accordance with Ark. Code Ann. § 11-9-410 and Arkansas case law that the Plaintiffs can settle around the W.C.C. carrier if the settlement is approved by the court. However, the W.C.C. carrier will have a lien on the proceeds of the settlement.

In response to that letter order, the Barbers notified Union Pacific via facsimile letter of their intent to appeal the court's order. In fact, neither party appealed the order, or attempted to have the court reconsider its ruling. On March 27, 2001, or more than one year after the expiration of the

settlement offer, Union Pacific sought to enforce the agreement against the Barbers.

The only substantive case that Union Pacific cites for the notion that the contract was enforceable one year after the stated expiration is *Helms v. Helms*, 317 Ark. 143, 875 S.W.2d 849 (1994). Union Pacific cites *Helms* for the proposition that the fact a party enters into a settlement that later appears to be improvident is no ground for relief. In that case, a spouse attempted to set aside a divorce settlement after admitting he consulted an attorney and nobody pressured him to sign the agreement. *Id.* *Helms* is inapposite.

Union Pacific sought to have the terms of the settlement agreement enforced. Specific performance is an equitable remedy which compels the performance of an agreement or contract on the precise terms agreed upon. *City of Crossett v. Pacific Bldgs., Inc.*, 298 Ark. 520, 769 S.W.2d 730 (1989). The precise terms of the settlement agreement called for court approval prior to February 18, 2000. The circuit court ruled that the failure of the court to approve the settlement discharged the parties from their obligation to perform under the contract. The trial court's ruling was correct.

VI. Motion To Strike

After the Barbers filed their brief on appeal, Union Pacific filed a motion to strike portions of the Barbers' brief. That motion is still outstanding as we initially passed on it until the submission of the case. In their motion, Union Pacific requests that we strike three specific portions of the Barbers' brief on appeal.

First, Union Pacific requests that we strike a "Table of Jurisdictions" included in the supplemental addendum to the Barbers' brief on appeal. The "Table of Jurisdictions" is a list of cases from across the country that hold evidence of near-misses is admissible in railroad accident cases at the court's discretion. Union Pacific contends that the list of

cases should be stricken from the brief pursuant to Rule 11 of the Arkansas Rules of Appellate Procedure and Rule 4-2 of the Supreme Court Rules. In response, the Barbers explain that while the table was only provided as a research aid to the court, it may be disregarded. Accordingly, as there is no dispute on the issue, we grant Union Pacific's request that we strike the "Table of Jurisdictions. "

Second, Union Pacific contends that we should strike a page in the Barbers' supplemental addendum described as Plaintiff's Exhibit 63-A because it is not part of the record. We note that while it appears Plaintiff's Exhibit 63-A may have been used at trial, it was never received into evidence and is not part of the record on appeal. This court will not consider a document which is included in the addendum and not in the record. *Barnett v. Monumental General Insurance Co.*, 355 Ark. ___, ___ S.W.3d ___ (Nov. 13, 2003). Accordingly, we strike Plaintiff's Exhibit 63-A from the Barbers' supplemental addendum.

Lastly, Union Pacific urges this court to strike a portion of the Barbers' brief that purportedly accuses counsel for Union Pacific of suborning perjury. The pertinent section of the brief states:

> Furthermore, while in *Gore*, at 579, the Court noted that the record failed to disclose any deliberate false statements, acts of affirmative misconduct, or concealment of evidence or improper motive, the record in this case reveals deliberate destruction of voice tapes, track inspection records, UP efforts to conceal evidence, and *suborning perjury*.

(Emphasis added.) At trial, the Barbers alleged that Union Pacific engaged in suborning perjury of key defense witnesses both before and during trial. The Barbers now assert that the statement in their brief on appeal was not an allegation of suborning perjury; rather, it was a statement of the issue before the court in upholding a punitive damages

award. The Barbers then make allegations of fact which they contend support a good faith basis for the allegation. Specifically, the Barbers explain that certain crewmen recounted the accident in crew interview briefs, and then, after meeting with counsel for Union Pacific, changed their statements. The trial court was presented with the issue in the Barbers' Response to Union Pacific's post-trial motion for judgment notwithstanding the verdict. That argument was not pursued in the hearing on the motion and the circuit court never made a ruling on it.

Gibson v. Boling, 274 Ark. 53, 622 S.W.2d 180 (1981) is instructive on the issue. In that case, we granted an appellant's request to strike a portion of the appellee's brief which implied that the former solicitors for the appellants were dishonest and committed what amounted to subornation of perjury. *Id.* While we recognize that this case has been heated from start to finish, we think that the Barbers have gone too far in their brief on appeal by suggesting that Union Pacific and its counsel suborned perjury. Indeed, the Barbers concede that they are not asking this court to determine whether suborning perjury occurred. The claim of suborning perjury is tantamount to a claim that Union Pacific acted criminally. *See* Ark. Code Ann. § 5-53-110 (Repl. 1997). We grant Union Pacific's request to strike that portion of the Barbers' brief.

Affirmed.

Dickey, C.J., and Thornton, J., dissent.

Ray Thornton, Justice, dissenting. I dissent on the basis that a $25 million punitive-damage award is excessive. I would hold that the trial court erred in denying Union Pacific's motion for remittitur of punitive damages.

A remittitur is within the inherent power of the court if an award is grossly excessive or appears to be a result of

passion or prejudice. *McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994). The reviewing court will reverse a remittitur if the punitive-damages award is supported by evidence and does not shock the conscience of the court. *Id.*

To determine whether the award is excessive under state law, we must analyze whether the jury's verdict is so great as to shock the conscience of the court. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003). In applying the test for excessiveness, we make a case-by-case determination, and the award of punitive damages may be reduced if the verdict shocks the conscience of the court or demonstrates that the jurors were motivated by passion or prejudice. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996).

I view the $25 million punitive-damage award as excessive. The facts in this case reflect a non-fatal injury to appellant, as contrasted with the facts in *Advocat, supra*, where the death of a nursing-home patient followed an extended period of neglect. In *Advocat*, we held that a punitive damage award of $63 million shocked the court's conscience, and we reduced the award to $21 million. *Id.* Before *Advocat*, the highest punitive-damages award that was affirmed by this court was $3 million. *See Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982).

Here, the evidence does not support a $25 million award in punitive damages. First, I cannot find where the Arkansas Highway Department required or suggested additional safety devices at Crossing 123. Second, Patricia Long, a senior claims representative for Union Pacific, testified that in her inspection of Union Pacific track records, she found no evidence that there had been any traffic accidents at Crossing 123. Third, Union Pacific entered into a contract with Tweedy Contractors to clear the vegetation four months prior to the accident, specifically

taking affirmative steps to remedy any vegetation problem at Crossing 123, thereby demonstrating a lack of malice. For these reasons, I do not find sufficient evidence to support such an excessive award of punitive damages, and I respectfully dissent.

Because I would remit the excessive punitive damages on the basis of prior Arkansas law, it is unnecessary to delve into an analysis under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

I am authorized to state that Chief Justice Dickey joins in this dissent.

IN THE ARKANSAS SUPREME COURT

No. 03-57

UNION PACIFIC RAILROAD COMPANY,
APPELLANT

VS.

CHRIS BARBER And CLAUDETTE BARBER,
APPELLEES

ALLIED WASTE INDUSTRIES, INC.
INTERVENOR

APPEAL FROM THE
ST. FRANCIS COUNTY CIRCUIT COURT
Honorable Harvey L. Yates, Circuit Judge

VOLUME I OF II
ABSTRACT AND BRIEF OF APPELLANT

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* * *

Ruling on Post-Trial Motions
(R. 6745-6756)

THE COURT: I think the administration of justice would be better [served] for me to announce my findings to you here now rather than to take this matter and try to wallow around through it any further and then get it out in writing. ...

I want to address the attorney misconduct issue first. One thing that disturbs me in this matter is that it almost seems as if a little bit of a cloud is being thrown to the Supreme Court, assuming that is where this is going to end up, that the court, by having an informal visit with the attorneys on this issue, maybe should have had that all on the record.

As I recall, because of the unusual and sensitive nature of this, the court talked to the attorneys, and I think it was by agreement that we visited a little bit about this matter before we got into a formal setting, where we're a lot more restricted on how we proceed. As I recall, we had an informal discussion. The court allowed everybody involved to say whatever they might want to say and the court made some comments about its thoughts and feelings and got some sense of direction of where we should head. (R. 6745-6746)

Then we had a court reporter come in and we got on the record. If I recall right, the court indicated that any party could put whatever they wanted to on the record on this issue and the court would permit that. As I recall, all the plaintiffs' attorneys were present. ... The court then gave the defense counsel an opportunity to make any comments or whatever they wanted to place on the record. [That] left each party completely open to make any full record they felt they needed to on this issue that might someday be reviewed by someone. For those reasons, I'm not going to consider the affidavit of Attorney Boyda. You can show it as proffered. The record will reflect it being proffered in support of your response to their motion, but the court gave everybody ample opportunity to make any record they desired to and the court will stick with that as being whatever we consider here. (R. 6746-6747)

As the court indicated that day, I was definitely concerned about the apparent violation of the sanctity of the jury deliberations. Mr. Easley fully understood that day from the court's comments that it's not a matter that I took lightly and I was very concerned about it. I was very concerned about the trial. I was very concerned about whether or not there was prejudice to the defendants in this situation.

The court indicated, without any objection by the plaintiffs, that it felt like the plaintiffs should not make any closing argument on the issue of punitive damages, that they should not present any proof. The court was not going to allow any proof other than the net worth of the railroad. Mr. Ursery is pretty well right that I didn't sense that he was conceding any issues or anything. He offered to stipulate to the figure rather than us having to have somebody to testify to it. In fact, at one point Mr. Ursery offered to let the court read the financial statement and then I said: "No, I don't choose to do that. That would put me in the position of making an error or being, to some extent, almost a witness." That figure was then stipulated to the jury and then there was no closing argument by the plaintiffs. (R. 6747-6748)

The court indicated that if the defense chose then to make a closing argument, or if they chose to put on evidence, that the plaintiffs obviously would have their right to rebut that. I don't remember about the evidence, but I'm sure that if they would have wanted to, it would have been the same on that too. The court felt like that was the best way to handle this situation under the circumstances. I don't recall that any party particularly objected to it. However, I'm not making a finding that anybody waived any issues. I don't know that they did. ... Obviously, the court was troubled by the conduct. It was very concerned about the conduct, very troubled by it, and that's the reason

that, on its own motion basically, it renewed the issue the next morning to reconsider it, to assure it was considered, and to make sure that it was properly considered. (R. 6748-6749)

We did whatever we thought was best to handle the situation under the circumstances. Even though I think it is very inappropriate conduct, I am of the opinion, in this particular case, that it did not prejudice the defendants, at least not to the level to require a new trial in this matter. I don't think that it was that prejudicial, that justice was not served because of this issue, or that the fundamental fairness of the trial was manifestly affected. Even though it's not appropriate, I don't feel that this had any prejudicial effect on the outcome of the proceedings. The court denies the defendants' motion on that issue.

Let me mention too, I don't think that I made any findings of fact on that occasion as to what Mr. Easley may or may not have heard. I listened to what he said about it and considered that in my ruling that I made, but I don't know that I really made any finding on that. The record will reflect that correctly. I'm not finding today that I did make that finding, but the record will reflect that one way or the other. ... (R. 6749-6750)

The next matter was counsel's remarks to the jury in his opening about the FRA statistics concerning the issue of whether or not Arkansas is number one in railroad grade crossing accidents. The record will reflect how he said that. I took it that he was talking about percentages, but I don't ... recall word for word. On that issue, the court's not going to consider the affidavit of Wiletta Carroll. Whatever she testified, the court made some rulings that limited her testimony to some extent, as I recall. I don't know if it was proffered or not, but whatever she testified to at the trial is all the court's going to consider and not whatever she may

have submitted in her affidavit along with the response to this motion. (R. 6750-6751)

I'm of the opinion that Mr. Pottroff's comments are not sufficiently prejudicial. I recall the opening statement and I think that Mr. Tucker objected. I believe the record will reflect that [he] did. ... The court would not let her testify to those statistics. I know there was another witness—I want to say it was an expert witness—but apparently that witness indicated that he didn't have enough knowledge of it and the court did not allow it through that witness. So at least on two occasions, the court denied the plaintiffs an opportunity to present that particular evidence. I don't think that is sufficient, though, to support granting a new trial in this matter and the court denies that motion. (R. 6751-6752)

What I considered to be a pretty tough issue for the court is the issue of punitive damages. Whether or not to allow it to go to the jury was a tough issue at the time I first considered it. I took it seriously at that time and, of course, I take it seriously today. The court gave very serious consideration at the time to whether or not to allow the jury to consider this issue. I was of the opinion then, and I'm still of the opinion today, that there was sufficient proof presented to at least create a question of fact on whether there's conscience indifference to the safety of the public from which malice could be inferred. The court allowed it to go to the jury based on the proof concerning the vegetation, based on the proof concerning the policies of the railroad, where they administer their company on the issues involving safety and various things.

On the issue of destruction of documents, it may be that even though I don't think it was, I don't know that there was any instruction to that effect. I suppose that the jury had an opportunity to consider whether or not the railroad

may have ignored some slow orders, and obviously, if they did and found that to be so, I assume that they would consider that, whether or not that would have [gone] possibly on the punitive damages issue. But as far as the destruction of documents, the court did not make a finding on that issue. The court only allowed [sic] that there was sufficient proof concerning the documents that were destroyed and not produced to allow that issue to go to the jury, with the instruction being that if the jury found, in accordance with the requirement of the instruction, that that be the case—I think basically it has to be that it was purposeful, I forget the exact wording in the instruction—that the jury then could consider that that information would have been detrimental to the railroad company, the defendant in the case. (R. 6752-6753)

I did not send this matter to the jury on the issue of punitive damages because of destruction of documents. I sent it to the jury on what I felt was sufficient proof presented on the issue of the vegetation and then the proof throughout the trial concerning policies of the railroad company and their actions. I thought at that time that there was sufficient evidence to support sending the issue to the jury and [that it] would be sufficient to support an award, if there was such, and the court feels the same today on that issue. ... I'm of the opinion that there were sufficient facts in this case [and that] the evidence was such that it was proper to present this issue to the jury was we presented it. ... The court does not find that a new trial should be granted on this issue and denies the motion. (R. 6753-6754)

As far as the issue of whether the punitive damages are excessive, I know $25 million is a whole lot of money. That's more money than any of us ever think about in eastern Arkansas on most occasions, but then you also have to look at the net worth of the railroad. Somebody here today said

it's $9.6 [billion]—I thought the stipulated figure was $9.8 [billion]—but either way, that's an awful lot of wealth.

The jury heard the facts. Of course, the court determined that those facts would support sending it to the jury, or else it never would have been there in the beginning. The jury heard the facts about the vegetation. They heard the facts about various policies of the railroad and the actions of the railroad. They had the opportunity to consider those and they also knew what happened here. They knew what they had found to be the facts concerning the injuries to the Barbers. I'm of the opinion that when you consider the factors set out by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, [517 U.S. 559 (1996)], and these other cases, that there is sufficient evidence here to support this award in accordance with those factors. (R. 6754-6755)

I understand that's an awful lot of money and it might very well be that, in my opinion as the judge, I might not have found factually that to be the figure, but I'm not supposed to substitute my finding in place of the jury. [I] only determine whether there are sufficient facts and evidence to support the award that the jury came back with. In my opinion, there is and the court denies the motion for a new trial. (R. 6755-6756)

Leslie W. Steen
Clerk

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

April 8, 2004

Robert Stephen Shafer
William H. Sutton
Scott H. Tucker
Attorneys a Law
400 W. Capitol, Suite 2000
Little Rock, AR 72201

RE: 03 0057. Union Pacific Railroad Company v. Chris Barber et ux.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:jko

cc: B. Michael Easley
William Charles Frye
Robert L. Pottroff
Gene Ludwig
Maureen E. Mahoney
Bette Green, Clerk
(CIV98-312)

U.S. Constitution Article VI
Clause 2. Supreme Law of the Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution Amendment XIV
Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. § 20103 (2000)

§ 20103. General Authority

(a) Regulations and Orders.—The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

(b) Regulations of Practice for Proceedings.—The Secretary shall prescribe regulations of practice applicable to each proceeding under this chapter. The regulations shall reflect the varying nature of the proceedings and include time limits for disposition of the proceedings. The time limit for disposition of a proceeding may not be more than 12 months after the date it begins.

(c) Consideration of Information and Standards.—In prescribing regulations and issuing orders under this section, the Secretary shall consider existing relevant safety information and standards.

(d) Waivers.—The Secretary may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety. The Secretary shall make public the reasons for granting the waiver.

(e) Hearings.—The Secretary shall conduct a hearing as provided by section 553 of title 5 when prescribing a regulation or issuing an order under this chapter, including a regulation or order establishing, amending, or waiving compliance with a railroad safety regulation prescribed or order issued under this chapter. An opportunity for an oral presentation shall be provided.

(f) Tourist Railroad Carriers.—In prescribing regulations that pertain to railroad safety that affect tourist, historic, scenic, or excursion railroad carriers, the Secretary of Transportation shall take into consideration any financial, operational, or other factors that may be unique to such railroad carriers. The Secretary shall submit a report to

Congress not later than September 30, 1995, on actions taken under this subsection.

49 U.S.C.. § 20106 (2000)

§ 20106. National Uniformity of Regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.